Administrative Justice Review
Background Papers

Background Papers
prepared by
Administrative Justice Project
for the
Attorney General of British Columbia

BRITISH COLUMBIA

July 2002

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The Administrative Justice Project was established in July 2001 for the purpose of carrying out a comprehensive review of British Columbia's system of administrative justice. The focus of this work has been the more than 50 administrative tribunals that form the core of this part of the province's justice system.

The material in this publication includes four of the six background papers that were released by the Project between December 2001 and May 2002. The papers, consolidated here for convenience, include:

Administrative Agencies and the Charter

Reviewing Original Decisions: Guiding Principles and Options

Standard of Review on Judicial Review or Appeal

The Statutory Powers and Procedures of Administrative Tribunals in British Columbia

A fifth background paper, Human Rights Review, has been released as a separate publication. The sixth background paper, Appointments: A Policy Framework for Administrative Tribunals, has not been published separately as it has been updated and released, as a report with recommendations, in conjunction with the Project's White Paper.

The other publications of the Administrative Justice Project include a White Paper, On Balance: Guiding Principles for Administrative Justice Reform in British Columbia, and a series of White Paper reports on the following topics:

Charter Jurisdiction

Dispute Resolution

Independence and Accountability

Making Sound Appointments

Providing Administrative Tribunals with Essential Powers and Procedures

Standing to Appear before Administrative Tribunals

The Terms of Reference for the Administrative Justice Project, the White Paper and all of the background papers and reports are available on the Project's website at www.gov.bc.ca/ajp. Interested readers are invited to contact the Project at ajp@ag.gov.bc.ca.

Administrative Agencies and the Charter

A Background Paper

Prepared by

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for

Administrative Justice Project

Ministry of Attorney General

Victoria, British Columbia

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Preface

This background paper is one of several to be released as part of the Administrative Justice Project. The project, initiated by the Attorney General, is a broad legal and policy review of the system of administrative justice. Its objectives are to ensure that:

- administrative agencies meet the needs of the people they serve;
- their administrative processes are open and transparent;
- their mandates are modern and relevant;
- government fulfills its obligations by providing the legislative and policy framework administrative agencies require to carry out their independent mandates effectively.

The Terms of Reference for the background papers are to ensure that:

- legislation is based, to the greatest extent possible, on a principled, consistent and clear articulation of the role and powers of administrative agencies;
- administrative agencies possess the procedural authority to respond flexibly, effectively and efficiently to resolve disputes by adjudicative or other means;
- compelling rationales exist for more than one "layer" of administrative appeal or review;
- courts and parties have clearer direction regarding the legislature's intention concerning matters such as the "standard of review" where a decision is challenged on judicial review or appeals.

The administrative agencies under consideration by the Administrative Justice Project are listed in tables attached to this paper as an Appendix. They do not include tribunals associated with the self-regulated professions.

The intent of this and the other background papers is to facilitate informed discussion about steps government can take to assist the work of administrative agencies. The papers provide a focus for this discussion and, it is hoped, will result in dialogue and debate within the administrative justice community. Comment will be taken into account by the Administrative Justice Project when it drafts a White Paper for release in early 2002. There will be a further opportunity for public input after the White Paper is released, before government decides on what steps it will take.

If the reader is interested, written comments may be forwarded to the author at the following address prior to March 15, 2002.

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EXECUTIVE SUMMARY

A person appearing before an administrative tribunal occasionally alleges that a provision in the tribunal's statute is inconsistent with *Charter of Human Rights and Freedoms*. The question then arises whether the tribunal has the power to decide that part of its enabling statute is inconsistent with the *Charter* and should therefore not be applied by the tribunal.

This paper explores the wisdom of legislative reform to clarify which (if any) tribunals should exercise this type of *Charter* jurisdiction. The paper does not address other *Charter* issues such as the ability of a tribunal to grant a remedy under section 24.

The legal test for whether a tribunal has the power to apply the *Charter* is a question of statutory interpretation. Did the legislature intend to grant that power? Despite the superficial clarity of this test, serious difficulties lurk behind it. In no case has the legislature expressly stated that a tribunal has (or does not have) *Charter* jurisdiction. The result is that tribunals and courts ask the broader question whether the tribunal has an express power to decide general questions of law. If the tribunal does not have this power, a range of practical factors are considered to help decide whether the tribunal has an implicit power to apply the *Charter*. The application of these factors is not always clear. The result is significant uncertainty in predicting what the courts will decide in an particular case. This uncertainty can result in significant expenditure of time and resources by parties appearing before the tribunal as well as by the tribunal itself.

When deciding a *Charter* question, a tribunal must address two issues. It must first determine whether the impugned legislative provision is inconsistent with a provision in the *Charter*. If it is inconsistent, the tribunal must then decide whether the legislation is nonetheless justified under section 1 of the *Charter*. Extensive evidence may be required to determine the section 1 issue appropriately.

A range of practical and legal factors are relevant to a policy decision about which (if any) tribunals should have the power to apply the *Charter*. The primary practical factor is whether the tribunal has the institutional capacity to decide *Charter* issues in an appropriate way. This involves issues such as the evidence heard by the tribunal, the competence of the tribunal's members to address *Charter* issues and the tribunal's procedures. Other practical factors are accessibility and the efficient use of adjudicative resources. The legal or constitutional issue arises from the lack of independence which tribunals have when contrasted with that enjoyed by judges. From one perspective, administrative tribunals are an arm of the executive. Does this mean that tribunals should not have the power to determine that a legislative provision is

constitutionally inoperative? Or does the over-riding nature of the Constitution mean that the *Charter* must be applied by tribunals when applying the law of the land?

The paper addresses these policy issues and examines possible criteria for selecting which tribunals should have *Charter* jurisdiction. The two primary criteria are to rely on existing statutory indicators (such as an express power to consider questions of law or a privative clause) or to consider non-statutory factors such as the institutional capacity and competence of a particular tribunal to decide *Charter* questions.

A decision needs first to be made whether this is an area where a clearer legislative articulation of tribunals' powers would be appropriate. If a decision is made to address this issue legislatively, the next step is to choose one of the four basic models for reform:

1. All tribunals have jurisdiction
2. No tribunals have jurisdiction
3. All tribunals have jurisdiction except for certain specified tribunals
4. No tribunals have jurisdiction except for certain specified tribunals

If either of the last two options is selected, the criteria for selecting which tribunals will have jurisdiction to apply the *Charter* must be identified. In addition, several procedural and remedial issues could be addressed legislatively such as whether tribunals should have the power to refer a *Charter* issue to court for determination.

The purpose of this background paper is to stimulate discussion about application of the *Charter* by administrative tribunals, in the hope that interested persons will provide comment to the Administrative Justice Project prior to preparation of the White Paper.

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1 INTRODUCTION

This paper addresses the ability of an administrative tribunal to rule that a provision in its enabling statute is inconsistent with the *Charter of Human Rights and Freedoms* and should therefore not be applied by the tribunal. The issue arises both at tribunal hearings and on judicial reviews from a tribunal decision. It results from section 52 (1) of the *Constitution Act, 1982*:

> *The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to extent of the inconsistency, of no force of effect.*

The question is the extent to which administrative tribunals are appropriate entities for giving effect to section 52.[1]

In deciding whether a statutory provision is inconsistent with the *Charter*, a tribunal (like a court) must address two questions.[2] First, is the impugned provision inconsistent with the *Charter* provision relied upon? If the answer to this question is yes, a second question must be asked. Is the impugned provision saved by section 1 of the *Charter*? Section 1 recognizes that *Charter* rights are not absolute and must be balanced against other values:

> *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

The Supreme Court has enunciated a test for identifying "such reasonable limits...as can be demonstrably justified in a free and democratic society". Both these questions need to be considered when addressing the extent to which an administrative tribunal should have the power to make *Charter* decisions.

There are other constitutional issues relevant to the jurisdictional powers of administrative tribunals. First, to what extent does an administrative tribunal have the ability to grant a remedy

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1 Section 52 does not answer this question. La Forest J. commented in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 at para. 12:

> It is essential to appreciate that s. 52(1) does not function as an independent source of an administrative tribunal's jurisdiction to address constitutional issues. Section 52(1) affirms in explicit language the supremacy of the Constitution but is silent on the jurisdictional point per se. In other words, s. 52(1) does not specify which bodies may consider and rule on Charter questions, and cannot be said to confer jurisdiction on an administrative tribunal.

2 There is also the question of choosing an appropriate remedy. This matter is discussed below.

under section 24 of the *Charter*?[3] Secondly, can an adjudicative tribunal rely on the constitutional division of powers between the federal and provincial governments as a basis for determining the scope of its enabling statute?[4] Thirdly, there are issues around a tribunal's ability to decide non-*Charter* constitutional rights such as aboriginal rights.[5] The discussion in this paper is restricted to the issue of legislation alleged to be inconsistent with the *Charter*. These three other constitutional matters are not addressed.

2 THE LAW

Test for Charter Jurisdiction

The Supreme Court of Canada stated in *Cooper* that the test for *Charter* jurisdiction is one of legislative intent:[6]

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3 Section 24 of the *Charter* states:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

As others have noted, the French version of section 24 uses the word "tribunal" rather than "cour". For cases on a tribunal's power to grant a remedy under section 24, see, for example, *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. Typically the question of a remedy under section 24 arises in cases where the statutory provision in question is not inconsistent with the *Charter*. See, e.g., *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at paras. 20, 29 and 94.

4 A tribunal can rely on the federal/provincial division of powers to determine whether, for example, a provincial human rights tribunal can hear a complaint arising from an area within federal jurisdiction. See, e.g., *Cooper v. Canada (Canadian Human Rights Commission); Bell v. Canada (Canadian Human Rights Commission)*, [1996] 3 S.C.R 854 at para. 20 per Lamer C.J. and at paras. 57 and 64 per La Forest J. See also Deborah M. McAllister, "Administrative Tribunals and the *Charter*: A Tale of Form Conquering Substance" (1992) *Special Lectures of the Law Society of Upper Canada* 131 at p. 135. Determining the scope of a statute is different from determining the constitutional validity of the statute from a division of powers perspective. On this latter issue in the context of labour boards, see *Cuddy Chicks Ltd., supra*, at para. 21. per La Forest J.

5 *Paul v. Forest Appeals Commission*, 2001 BCCA 411. Much of the Court of Appeal's discussion in this case focused on the constitutional ability of the province to give an administrative tribunal jurisdiction to decide issues of aboriginal rights to land, which constitutionally fall under the exclusive jurisdiction of federal government.

6 *Supra*, para. 45-46 per La Forest J. The earlier cases referred to by La Forest J. in this passage used a three part test to identify the legislative intent: does the tribunal have jurisdiction over the parties, the subject matter and the remedy? See La Forest J.'s earlier statement in *Tétreault - Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22 at para. 22:

> Applying the test set forth in Douglas College and Cuddy Chicks, I find that, while the Board of Referees had jurisdiction over the parties in this case, it did not have jurisdiction over the subject matter and the remedy. The subject matter before the Board concerned not simply the determination of the respondent's eligibility for benefits, but also the determination of whether s. 31 of the *Unemployment Insurance Act, 1971* violated s. 15 of the Charter. Similarly, the remedy would have required the Board to disregard s. 31 when

> *These authorities [Douglas College, Cuddy Chicks and Tétreault-Gadoury] make it clear that no administrative tribunal has an independent source of jurisdiction pursuant to s. 52 (1) of the Constitution Act, 1982. Rather, the essential question facing a court is one of statutory interpretation – has the legislature, in this case Parliament granted the administrative tribunal through its enabling statute the power to determine questions of law? As noted by the majority in Tétreault-Gadoury, supra, at p. 32:*
>
> *As I have stressed in both Douglas College and Cuddy Chicks, supra, s. 52 (1) does not, in itself, confer the power to an administrative tribunal to find a legislative provision to be inconsistent with the Charter. Rather, the inquiry must begin with an examination of the mandate given to the particular tribunal legislature.*
>
> *If a tribunal does have the power to consider questions of law, then it follows by the operation of s. 52 (1) that it must be able to address constitutional issues, including the constitutional validity of its enabling statute….*

The power to consider questions of law must go beyond interpreting and applying the tribunal's enabling statute.[7] The additional step has been variously described as a power to address "general questions of law"[8] and "the power to interpret or apply any law necessary to reach its findings".[9]

In those cases where the legislature has not granted an express power to decide general questions of law, the courts must decide whether there is an implicit power. In deciding whether there is an implied power, the courts take into account a range of practical factors, such as efficiency, accessibility and expertise of the tribunal. These factors are addressed in more detail below in the discussion of policy factors affecting a decision whether a tribunal should have jurisdiction to apply the *Charter*.[10]

Discussion

At one level, the legal test for jurisdiction is straightforward. It is a question of statutory interpretation. Did the legislature intend the tribunal to have the power to decide general

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awarding the respondent benefits, assuming it found s. 31 to be inconsistent with the Charter. As I indicated above, under the legislative scheme described in the Act, such a determination rested within the jurisdiction of the umpire, not the Board of Referees.

7 *Cooper, supra*, para. 55.

8 *Ibid.*

9 *Tétreault-Gadoury, supra*, para. 10 per La Forest J. See also *Martin v. Nova-Scotia "Workers' Compensation Board"*, 2000 NSCA 126, 192 DLR (4) 611 at para. 93, leave to appeal granted by SCC, June 14, 2001.

10 As noted above, this paper addresses application of the *Charter* by tribunals only in the context of whether a tribunal has the jurisdiction to ignore a provision in its enabling statute on the basis that it is inconsistent with the *Charter*.

questions of law (and hence have *Charter* jurisdiction)? This statement of the test, however, is deceptively simple. In practice, application of the test is frequently clouded in uncertainty. *Cooper* is itself an example of this uncertainty. Six of the seven judges agreed on the general test; however, two of these judges reached a different conclusion than their colleagues about the result of applying the test in that case. (To make matters even more interesting, Chief Justice Lamer in a strongly worded dissent expressed fundamental misgivings about the test, even though he had previously agreed with it in earlier decisions of the Court.[11])

The practical result is that it is often difficult to predict when the courts will decide that a particular tribunal has *Charter* jurisdiction.[12] Andrew Roman has described the problem as follows:

> *It is now very difficult to determine whether any particular tribunal in any particular situation has jurisdiction to decide* Charter *issues. That is because...the test for determining this is so vague in content, and so speculative in its application.*

This uncertainty can lengthen and increase the cost of tribunal proceedings (including any related court proceedings).

Other criticisms have been leveled against the current jurisprudence. Since many tribunals were created before the *Charter* in 1982, several writers have commented that the courts rely on a legal fiction in their use of legislative intent.[13] In reality, the courts are making a policy decision, not divining true legislative intent.[14]

Another criticism of the current jurisprudence is that the current test does not always lead to an appropriate result from a policy perspective. We shall return to the policy issues below. Finally, Lamer C.J. has suggested that it is constitutionally inappropriate to allow administrative tribunals the power to ignore a provision in the statute which creates the tribunal.

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11 *Cooper, supra*, para. 7:

> But in my respectful opinion, this exercise is deeply flawed because the premise upon which my colleagues rely – that the intent to confer on tribunals a power to interpret general law in turn implies an intent to confer on tribunals a power to refuse systematically to apply laws which violate the Charter – is suspect.

12 Andrew J. Roman, "Case Comment: *Cooper v. Canada (Human Rights Commission)*" 43 Admin. L.R. (2d) 243.

13 See, for example, M.C. Crane, "Administrative tribunals, *Charter* challenges, and the "Web of institutional relationships"" (1998) 61 *Saskatchewan Law Review* 495 at p. 506, and Andrew J. Roman, "Case comment: *Cooper v. Canada (Human Rights Commission)*" (1997) 43 *Admin. L. R.* (2d) 243 at p. 244. See also Lamer, C.J.'s dissent in *Cooper, supra*, at para. 7, quoted above.

14 See, for example, Debra M. McAllister, "Administrative tribunals and the *Charter*: A Tale of Form Conquering Substance", *supra*, at p. 150.

3 ANATOMY OF A CHARTER DECISION

An informed assessment of a tribunal power to apply the *Charter* requires an understanding of what is involved when a *Charter* decision is made by a court or administrative tribunal.

As noted earlier, two legal questions must be answered. Is the impugned legislative provision inconsistent with a provision in the *Charter*? If yes, is the legislation nonetheless justified under section 1 of the *Charter*? Both questions may require an appropriate factual record before the legal questions can be properly answered. A recent decision of the Supreme Court of Canada regarding a *Charter* decision by the British Columbia Labour Relations Board illustrates the sub-questions which must be addressed under section 1 of the *Charter*:[15]

> *The aim of analysis under s. 1 of the Charter is to determine whether the infringement of a Charter right or freedom can be justified in a free and democratic society. Following the tests elaborated initially in R. v. Oakes, [1986] 1 S.C.R. 103, and subsequently in cases including Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, and Thomson Newspaper, it is incumbent on the respondent and the Attorney General as the parties seeking to uphold the restriction on a Charter freedom to show on a balance of probabilities that such an infringement can be justified. To satisfy this burden, they must demonstrate that the objective sought to be served by the legislative restriction is of sufficient importance to warrant overriding a constitutionally protected right or freedom. Only a significantly pressing and substantial objective can meet this requirement. They must also demonstrate that the legislative restriction is proportional to the objective sought by the legislature. In determining proportionality, three factors must be examined. First, the measure chosen must be rationally connected to the objective. Second, it must impair the guaranteed right or freedom as little as reasonably possible. And third, there must be proportionality between the importance of the objective and the deleterious effects of the restriction and between the deleterious and salutary effects of the measure. The analysis must be undertaken in the context of labour relations.*

When a legislative provision is challenged under the *Charter*, the Attorney General (on behalf of the government) will in many cases need to lead evidence to inform the tribunal's judgment whether, for example, the legislative provision reflects "proportionality between the importance of the objective [of the provision] and the deleterious effects of the restriction and between the deleterious and salutary effects of the measure." This evidence can be both extensive and complex.

In those cases where a tribunal decides that a provision in its enabling statute is inconsistent with the *Charter*, it must then decide upon an appropriate remedy. Frequently this will be simply a

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15 *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083 at para. 34 per Cory J. for the Court.

decision that the provision in inoperative and does not apply to the case before the tribunal.[16] What should happen, however, if the only reasonable way of remedying the situation is to read in words that do not exist in the legislation?[17] The courts will do this in some circumstances, typically where treating a provision as inoperative would adversely affect a large group of people.[18]

4 THE POLICY QUESTION

Introduction

One of the goals of the Administrative Justice Review is to increase certainty about the roles and powers of administrative agencies. Since the ability of a tribunal to apply the *Charter* is a question of a statutory interpretation, the legislature has the authority to state clearly which (if any) tribunals have the power to apply the *Charter.*[19]

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16 See the discussion below on the precise legal nature of a decision by a tribunal that a statutory provision should not be applied.

17 The difficulty in selecting an appropriate remedy can be illustrated by a somewhat simplistic example. If the legislature was to enact a provision for a cash payment "to fathers with either blond or black hair", it might well be challenged by a father with brown hair (or a mother with any colour of hair). If a court was to accept that this provision was inconsistent with section 15 of the *Charter* and not saved by section 1, it would then have to decide on a remedy.
A decision declaring the entire provision inoperative would be of no assistance to the brown haired father challenging the provision and would deny the payment to fathers fortunate enough to have blond or black hair. A decision deleting merely the words "with blond or black hair" would provide for payment to all fathers (but not mothers) but would result in a greater total expense than originally intended by the legislature. A decision reading in the words "or any other father or mother" would greatly increase the government expenditure. The court would have to ask itself whether, in these circumstances, the legislature would have enacted an increased payment for any group of parents.
Similar remedy questions would face an administrative tribunal dealing with this issue. The only difference would be that, in strict law, the tribunal's decision would have application only to the particular case in front of it. The decision would not have the broader effect of a declaration by a superior court. The legal and practical nature of tribunal decisions is discussed further below in the context of the constitutional and legal policy factors relevant to whether tribunals should have jurisdiction to address *Charter* challenges to legislation.

18 See the discussion of these remedial questions in *Schachter v. Canada*, [1992] 2 S.C.R. 679.

19 A number of writers have suggested that legislative action would be an appropriate response to the question of which administrative tribunals have power to apply the *Charter*: McAllister, *supra*, p. 159; Marilyn L. Pilkington, "Legislative responsibility for the jurisdiction of tribunals to adjudicate constitutional rights and remedies" (1992) *Special lectures of the Law Society of Upper Canada* 181 at pp. 184 and 189; John M. Evans, "Administrative tribunals and *Charter* challenges: Jurisdiction, discretion and relief" (1997) 10 *CJALP* 355 at 363-364 where he refers to a suggestion by Ron Ellis; Crane, *supra* at p. 527. Both Pilkington and McAllister comment that tribunals need to be a properly equipped if they are to decide *Charter* issues.

There are five broad options:[20]

i. All tribunals have jurisdiction
ii. No tribunals have jurisdiction
iii. All tribunals have jurisdiction except for certain specified tribunals
iv. No tribunals have jurisdiction except for certain specified tribunals
v. Status quo (courts decide the issue on a case by case basis)

In addition to these primary options, there are a number of secondary options. The latter would include the criteria for selecting which tribunals would be exceptions to a general rule that no (or all) tribunals would have jurisdiction to apply the *Charter*. These secondary options are discussed later in this paper.

Uncertainty whether a particular tribunal does or does not have the power to apply the *Charter* incurs additional cost and delay for parties appearing before the tribunal. In addition, the lengthening of tribunal hearings in order to deal with this threshold issue reduces a tribunal's ability to deal with both other cases and other aspects of its mandate. For this reason, there appears to be a good argument for legislative action clarifying the jurisdiction of tribunals to apply the *Charter*.[21]

The remainder of this discussion therefore addresses the policy factors relevant to which of the first four options set out above should form the basis for any legislative action.

Jurisdiction or No Jurisdiction

The factors relevant to the policy decision whether a tribunal should have *Charter* jurisdiction have been discussed in both the academic literature[22] and court decisions. They are of two types:

i. practical
ii. legal/constitutional

Practical Factors

In court cases, the discussion of the practical factors usually takes place in the context of assessing the "practical considerations [which] may be of assistance in determining the intention

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20 These options are variations on those described by Roman, *supra*, at p. 245.

21 This issue, however, remains open for discussion during the period for public input following release of paper.

22 See *Roman, supra*; Crane, *supra*; et al.

of Parliament".[23] The practical factors fall into two broad groups. The first consists of those relevant to the question whether the tribunal is an appropriate form (in a practical sense) for resolving the *Charter* issue. The second deals with efficiency questions.

La Forest J. identified a number of the practical issues in the following passage from *Cooper*:[24]

> *In considering whether a tribunal has jurisdiction over the parties, the subject matter before it and the remedy sought by the parties, it is appropriate to take into account various practical matters such as the composition and structure of the tribunal, the procedure before the tribunal, the appeal route from the tribunal, and the expertise of the tribunal.*

He elaborated on this in the following passage:[25]

> *In the present case the practical advantages in having the Commission consider the constitutionality of its own statute are limited. First, since the Commission is not an adjudicative body it cannot be considered a proper forum in which to address fundamental constitutional issues. As this Court has previously found, there is no requirement for anything more than a "paper hearing" for the parties before the Commission. Although I readily acknowledge that the informal and accessible process of administrative bodies may well be a considerable advantage to a party, as compared to the regular court system, there comes a point where a body such as the Commission simply does not have the mechanism in place to adequately deal with multifaceted constitutional issues. For example, the Commission is not bound by the traditional rules of evidence. This means that it is open to the Commission to receive unsworn evidence, hearsay evidence, and simple opinion evidence. Such an unrestricted flow of information may be well suited to deciding the threshold question facing the Commission, but it is inappropriate when determining the constitutional validity of a legislative provision. In the latter case, suitable evidentiary safeguards are desirable. Related to this problem is the concern that one of the aims of the Commission, to deal with human right complaints in an accessible, efficient and timely manner, would be disrupted and interfered with by allowing the parties to raise constitutional issues before the Commission. Such issues would of necessity require a more involved and lengthy process than is presently the case. In my view, it was not the intention of Parliament that the Commission's screening function become entangled in this manner.*
>
> *A second and more telling problem in the case of the Commission is its lack of expertise. In Tétreault-Gadoury, supra, I pointed out, at p. 34, that an Umpire under the Unemployment Insurance Act was a Federal Court judge which would ensure that a complaint received "a capable determination of the constitutional issue". Similarly in both Douglas/Kwantlen and in Cuddy Chicks, supra, the expertise of labour boards and the assistance they could bring to bear on the resolution of constitutional issues was recognized. In contrast this Court has made clear in Mossop, supra, at pp. 584-85, and reiterated in Gould v. Yukon*

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23 *Cooper*, *supra* at para. 59. Other judicial discussions include *Martin*, *supra*, at para. 96 ff.

24 *Supra*, para. 47.

25 *Supra*, paras. 60-61.

> *Order of Pioneers, [1996] 1 S.C.R. 571, at pp. 599-600, that a human rights tribunal, unlike a labour arbitrator or labour board, has no special expertise with respect to questions of law. What is true of a tribunal is even more true of the Commission which, as was note in Mossop, is lacking the adjudicative role of a tribunal.*

Although these comments were made in the context of a tribunal described as non-adjudicative, they are equally applicable to an assessment of whether an adjudicative tribunal should exercise *Charter* jurisdiction.

An interesting aspect of the discussion of these factors is their two-edged nature. For some writers, a particular issue such as evidence is an argument in favour of tribunals having *Charter* jurisdiction, while for others evidentiary matters lead to the opposite conclusion. This ambivalence can be seen even in individual judges. As noted above, La Forest J. expressed concern that tribunals' ability to use non-court types of evidence militated against them having *Charter* jurisdiction. Several years earlier, however, he referred to a similar argument but added:[26]

> *There are, as well, clear advantages for the decision-making process in allowing the simple speedy, and inexpensive processes of arbitration and administrative agencies to sift the facts and compile a record for the benefit of a reviewing court.*

This latter view has support in academic writers such as John M. Evans.[27]

Competence and expertise are often cited as a factor which may help identify which tribunals should have *Charter* jurisdiction. The courts sometimes draw distinctions between the relative expertise of different types of tribunals. For example, the Supreme Court has referred to the expertise of labour boards as a factor supporting a power to use the *Charter* as a basis for not applying a statutory provision.[28] Not everyone agrees with this approach. One writer has referred to the courts' assessment of the relative expertise of tribunals as "guesswork".[29] In the view of another writer, the lack of legal training of many tribunal members is exacerbated by the fact that parties are frequently not represented by legal counsel at a tribunal hearing.[30]

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26 *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 at paras. 55 and 59.

27 *Supra*, at p. 361. See also Debra M. McAllister, "The Role of Tribunals in Constitutional Adjudication" (1991) 1 *National Journal of Constitutional Law* 25 at p. 74.

28 See, for example, the passage by La Forest J., quoted above from *Cooper*, para. 61; and *Cuddy Chicks Ltd., supra*, at para. 16.

29 Roman, *supra*, at p. 249.

30 Debra M. McAllister, "The Role of Tribunals in Constitutional Adjudication" (1991) 1 *National Journal of Constitutional Law* 25. She refers to the following argument at p. 74:

Accessibility is obviously an important factor. Tribunals are, for the most part, more accessible to members of the public than are the courts.

The above factors relate to whether the tribunal is an appropriate forum in a practical sense: does it have the institutional competence, resources and procedural machinery to deal with the complex issues and evidence which typically arise in *Charter* cases? In those situations where a tribunal may meet these criteria, the question of adjudicative efficiency remains.

Efficiency, like evidence, is a factor which can cut both ways. On one hand, an argument can be made that it is more efficient to deal with all relevant issues in a single hearing at first instance – rather than requiring a party to initiate court proceedings either during or after the tribunal hearing. On the other hand, it is argued that, since *Charter* issues will almost certainly end in the courts in any event, it makes more sense not to use tribunal time dealing with these complex questions which they are ill prepared to address appropriately. The two sides of the efficiency argument are reflected in *Cooper*. For the majority, La Forest J. stated:[31]

> *To my mind the relevant practical considerations do not argue in favour of having the Commission consider Charter issues. Without question there is on the surface an attraction and efficiency, at least for the complainant, in having the constitutional matter first heard by the Commission. That will always be so, however, and in the present situation I am of the view that the reality would in fact be different. It is likely that in a case such as the one presently before us the decision of the Commission on the validity of a provision of the Act under the Charter would be the subject of judicial review proceedings in the Federal Court. It would be more efficient, both to the parties and to the system in general, to have a complainant seek a declaration of constitutional invalidity in either the Federal Court or a provincial superior court. In such a setting the question can be debated in the fullness it requires and the proper expertise can be brought to bear on its resolution.*

In contrast, McLachlin J. wrote in her dissent:[32]

> *Applicants like the appellants suffer the greatest prejudice from a ruling that the Commission has no choice but to ignore the Charter challenge and to proceed on the basis that the law is valid. They must first launch their complaint with the Human Rights Commission, knowing that this is a useless pro forma step. When the complaint is refused, as it inevitably must be, they must then bring an action in Federal Court for a declaration that the section of the Canadian Human Rights Act at issue offends the Charter and is invalid. The requirement of this pro forma*

> ...tribunals are frequently composed of lay people having no legal training. When faced with a complex *Charter* issue, which may be poorly argued by unrepresented parties, the tribunal is left to make a decision in a legal vacuum, which will be a problem regardless of how extensive the factual record is.

31 *Cooper*, *supra*, para. 62.

32 *Ibid.*, para. 74.

> *step can only serve to discourage complainants from challenging the constitutionality of a provision of the Canadian Human Rights Act.*

The above passages address efficiency from the perspective of individual parties. There is also the question of efficiency from the larger tribunal perspective. Since *Charter* questions are by their nature complex, one of the arguments is that a power to deal with *Charter* questions will have an adverse impact on a tribunal's efficiency.[33] It reduces the tribunal's ability to deal with an often heavy case load in a timely manner.

Before leaving practical considerations, there is a small amount of anecdotal information on how tribunals feel about exercising *Charter* jurisdiction. None of it is conclusive. The Administrative Justice Project held a consultation workshop in September, 2001, with a number of people, primarily representatives from most of the adjudicative tribunals in this province. The purpose of the workshop was to obtain input on the matters addressed in this and other background papers by the Administrative Justice Review. On the question of tribunals' experience in applying the *Charter*, the views expressed were mixed. One of the larger tribunals expressed satisfaction with its power to address *Charter* issues at first instance. Its representative noted that this power enabled the tribunal to create "the factual matrix for the court to consider around the constitutional or the *Charter* issue." Similarly, one of the larger appeal boards stated that it had had no difficulty addressing *Charter* issues. In contrast, a representative from another tribunal alluded to the complexity and time consuming nature of *Charter* issues. One tribunal representative felt that "most tribunals try to stay away from" *Charter* issues.

The practical wisdom of *Charter* jurisdiction[34] was squarely addressed in a 1995 decision by a panel of the Ontario Workers' Compensation Appeals Tribunal.[35] Although the panel concluded that it had the power to consider a *Charter* challenge, its reasons for decision state:

> *It is apparent from the trend of recent Supreme Court of Canada decisions that that Court is firmly of the view that it is important wherever possible to have* Charter *challenges dealt with first at the quasi-judicial level. This Panel is not as sanguine as the Supreme Court as to the good sense of that policy. It imposes, in our view, a responsibility on administrative justice system agencies of a nature which even the most sophisticated are ill-equipped to shoulder.*

There is no consensus among judges, practitioners and academics about the implications of the practical considerations relevant to a policy on *Charter* jurisdiction for administrative tribunals.

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33 *Cf.* Crane, *supra*, p. 503.

34 As noted earlier, this paper does not address the question whether a tribunal is a competent court for the purpose of granting a remedy under section 24 of the *Charter*.

35 Decision No. 534/90R.

For example, evidentiary issues are used to argue both in favour of and against tribunal jurisdiction. Probably the most that can be said is that there is broad agreement that labour relations boards can exercise this jurisdiction appropriately. There is, however, another group of factors to be considered.

Legal and Constitutional Factors

In addition to the practical factors discussed above, there is an important constitutional issue which must be addressed in any assessment whether tribunals should have jurisdiction to deal with *Charter* challenges to their enabling statutes. The Supreme Court of Canada has ruled that it is legally appropriate for at least some tribunals to exercise this jurisdiction. Chief Justice Lamer, however, reached an opposite conclusion by the time he wrote his dissent in *Cooper*.[36]

> *I fear that in seeking to give the fullest possible effect to the Charter's promise of rights-protection, the previous judgements of this Court may have misunderstood and distorted the web of institutional relationships between the legislature, the executive and the judiciary which continue to form the backbone of our constitutional system, even in the post-Charter era, This distortion has been achieved by giving administrative tribunals access to s. 52. But in my opinion, s.52 can only be used by the courts of this country, because the task of declaring invalid legislation enacted by a democratically elected legislature is within the exclusive domain of the judiciary. I should make it very clear at the outset of my reasons that I am not addressing the role of administrative tribunals in relation to s. 24 (1) of the Canadian Charter of Rights and Freedoms.* [emphasis added]

This passage raises the question of what precisely a tribunal does when it decides that a statutory provision is inconsistent with the *Charter*. What is the effect of the tribunal's decision?

Superior courts[37] have the power to grant a declaration that a statutory provision is constitutionally invalid. This declaration becomes part of the general law and must be applied by all tribunals and government, unless the decision is overturned on appeal to a higher court. In contrast, a decision of an administrative tribunal applies (in strict law) only to the facts of the particular case before the tribunal.[38]

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36 *Supra*, para. 3.

37 For provincial purposes, the superior courts are the British Columbia Supreme Court, the British Columbia Court of Appeal and the Supreme Court of Canada. In contrast, the Provincial Court is an "inferior court", as was the former County Court. The distinction between superior courts and inferior courts derives from the historical development of the English courts, on which Canadian courts were based historically. The distinction is not based on whether the judges to the courts are appointed by the federal government pursuant to s. 96 of the *Constitution Act*.

38 The same is true for decisions of an inferior court such as the Provincial Court.

The Supreme Court has on more than one occasion confirmed that a tribunal decision on invalidity is not "a binding legal precedent" and "is not tantamount to a formal declaration of invalidity, a remedy exercisable only by the smallest superior courts."[39]

Although tribunals do not have the formal ability to grant a declaration of invalidity, Chief Justice Lamer expressed the view in *Cooper* that, for all practical purposes, a tribunal's decision of invalidity had much the same effect as a court declaration:[40]

> *...the distinction between declarations of invalidity and refusals to apply is hard to sustain.*
> ...
> *The de facto equivalence between refusals to apply and declarations of invalidity decisively demonstrates that tribunals, when they refuse to apply their enabling legislation under s. 52 of the Constitution Act, 1982, are improperly exercising the role of the courts.*

Part of the rationale for Lamer C.J.'s position is that a decision by a tribunal that a statutory provision in its enabling statute is inconsistent with the *Charter* will have practical implications beyond the particular case before it. For example, parties will be less likely in the future to pursue or resist a claim which depends on the impugned statutory provision even though the tribunal is not in law bound to follow its earlier decision.

This judicial disagreement about the significance of a tribunal's decision that a statutory provision is inconsistent with the *Charter* leads into Chief Justice Lamer's broader concern that administrative tribunals are not a constitutionally appropriate forum for addressing the constitutional validity of legislation:[41]

> *The constitutional status of the judiciary, flowing as it does from the separation of powers, requires that certain functions be exclusively exercised by the judicial bodies. Although the judiciary certainly does not have an interpretive monopoly over questions of law, in my opinion, it must have exclusive jurisdiction over challenges to the validity of legislation under the Constitution of Canada, and particularly the Charter. The reason is that only courts have the requisite independence to be entrusted with the constitutional scrutiny of legislation when that scrutiny leads a court to declare invalid an enactment of the legislature. Mere creatures of the legislature, whose very existence can be terminated at the stroke of a legislative pen, whose members, while the tribunal is in existence, usually serve at the pleasure of the government of the day, and whose decisions in some circumstances are properly governed by guidelines established by the executive branch of government, are not suited to this task. I must stress again,*

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39 *Cuddy Chicks, supra*, at para. 17 per La Forest J. See also *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 at para. 50. per La Forest J.; *cf.* Crane, *supra*, at p. 500.

40 *Supra*, paras. 17 and 19.

41 *Cooper, supra*, para. 13.

> *however, that questions of this sort relate to s. 52 of the Constitution Act, 1982; I do not address s. 24 (1) of the Charter.*

After referring to an earlier decision on judicial independence, Lamer C.J. added:[42]

> *The Court (per Le Dain J.) identified three feature of courts which made them independent security of tenure, financial security, and independence "with respect to matters of administration bearing directly on the exercise of its [i.e., the courts'] judicial function" (Valente, supra, at p. 708). In the context of Charter adjudication, these features help to insulate the courts from interference, inter alia, by elected legislatures, and thus ensure that the courts can safeguard the supremacy of Charter rights through the vehicle of s. 52 of the Constitution Act, 1982. Conversely, the absence of these features in tribunals makes them unsuited to measuring legislative provisions against the requirements of the Charter and to overturning the will of the democratically elected representatives of the Canadian people.*

Lamer C.J.'s key concern is that only the courts have the necessary independence from government, to be entrusted with the weighty responsibility of deciding whether a particular statutory provision is unconstitutional. None of the other judges in *Cooper* expressed agreement with Chief Justice Lamer's concerns. In particular, McLachlin J. (as she then was) vigorously disagreed with his views. She rejected the view that tribunals (or at least some of them) should not have the power to make decisions on *Charter* validity:[43]

> *Two related principles of general application governed the question before us. The first is the general rule that all decision-making tribunals, be they courts or administrative tribunals, are bound to apply the law the land. In doing so, they apply all the law of the land, including the Charter…Section 52 of the Constitution Act, 1982 proclaims the Constitution as the "supreme law" of Canada. Citizens have the same right to expect that it will be followed and applied by the administrative arm of government as by legislators, bureaucrats and the police. If the state sets up an institution to exercise power over people, then the people may properly expect that that institution will apply the Charter.*
>
> *…*
>
> *This Court has repeatedly held that administrative tribunals empowered to decide questions of law may consider Charter questions…. This conclusion reflects the principle that tribunals must apply the law of the land in its entirety. If the tribunal is in power to decide questions of law, then that power goes not to part of the law but to all the law; absent an indication that Parliament intended to exclude Charter issues from the tribunal's purview, the courts should not do so by judicial fiat.*
>
> *…*
>
> *The second principle of general application to the question before us is this: a tribunal's ruling that a law is inconsistent with the Charter is nothing more, in the final analysis, than a case of applying the law of the land – including the most fundamental law of the land, the Constitution….Laws are not struck down by*

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42 *Cooper, supra*, para. 15.

43 *Cooper, supra*, at paras. 78, 81 and 83.

> *judicial fiat, but by operation of the Charter and s. 52 of the Constitution Act, 1982....The fact that invalidation of laws under the Charter is linked to inconsistency rather than the action of a particular court, undercuts the suggestion that striking down laws under the Charter is the prerogative of a particular court.*

Elsewhere in her decision, McLachlin J. equated the power of administrative tribunals with that of the inferior provincial courts with respect to deciding questions of law arising in proceedings before the tribunal "in so far as such tribunals have been give the power by Parliament to decide questions of law."[44]

More recently, Chief Justice McLachlin (writing for an unanimous court) commented on the place of administrative tribunals in the Canadian constitutional framework. Although *Ocean Port* did not involve the *Charter* jurisdiction of a tribunal, it did raise questions about the independence of administrative tribunals and their relationship both to the courts and to the governments which created them:[45]

> *...Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.*
>
> *This principle reflects the fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts: Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 (the "Provincial Court Judges Reference"). Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges – both in fact and perception – by insulating them from external influence, most notably the influence of the executive: Beauregard v. Canada, [1986] 2 S.C.R. 56, AT P. 69; Régie, at para. 61.*
>
> *Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure*

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44 *Cooper, supra*, para. 99. Her Ladyship did not address Lamer C.J.'s concerns about judicial independence and the separation of powers.

45 *Ocean Port Hotel v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, at paras. 22 - 24.

> *required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract* Charter *requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament of the legislature and, absent constitutional constraints, this choice must be respected.*

This passage shows clear similarities to parts of Lamer C.J.'s dissent in *Cooper* (quoted above). It reflects the unique nature of administrative tribunals:[46]

> *...tribunals span the constitutional divide between the judiciary and the executive. While they may possess adjudicative functions, they ultimately operate as part of the executive branch of the government, under the mandate of the legislature. They are not courts, and do not occupy the same constitutional role as courts.*

Criteria for Identifying Selected Tribunals

A decision about which (if any) administrative tribunals should have *Charter* jurisdiction depends on an assessment of policy factors, both practical and constitutional. If a decision is made that at least some tribunals should have this jurisdiction, a decision must then be made about the criteria for identifying these selected tribunals.

As noted above, the courts have focused their attention on whether the legislature has either expressly or implicitly granted a tribunal the power to decide general questions of law. From a policy perspective, this is only one of several ways of identifying which tribunals should have *Charter* jurisdiction.

Existing Legislation

If one focuses on existing legislation as the tool for identifying tribunals, there are several tests which could be used. (The use of tools other than wording in the current legislation is discussed below.)

The most obvious criterion is whether the legislature has granted the tribunal an express power to decide questions of law. The following tribunals currently have this power:[47]

- Employment Standards Tribunal
- Residential Tenancy Arbitrators
- Securities Commission
- Workers' Compensation Board

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46 *Ocean Port, supra*, at para. 32.

47 This list does not include any self-regulatory tribunals which may have an express power to decide questions of law. As noted earlier, tribunals of the self-regulated professions do not fall under the scope of the Administrative Justice Project.

- Workers' Compensation Board – Appeal Division
- Workers' Compensation Board – Criminal Injuries Section

For each of these tribunals, the power is defined as a power to decide questions of both fact and law.[48] A conspicuous omission from this list is the Labour Relations Board. Although it has a strong privative clause, its enabling statute does not contain a provision expressly conferring a power (in so many words) to decide questions law.[49]

A second possible criterion would be to use the existence of a privative clause as the critical factor. The ability of a party to seek judicial review of a tribunal decision flows from the inherent supervisory jurisdiction of the British Columbia Supreme Court.[50] A privative clause is a legislative provision which limits the availability of judicial review. The privative clause in the *Workers' Compensation Act* is a lengthy example of this type of provision:[51]

> *The board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under this Part, and the action or decision of the board on them is final and conclusive and is not open to question or review in any court, and proceedings by or before the board must not be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise into any court, and an action must not be maintained or brought against a governor, officer, appeal commissioner or employee of the board in respect of an act, omission or decision done or made in the belief that it was within the jurisdiction of the board; and, without restricting the generality of the foregoing, the board has exclusive jurisdiction to inquire into, hear and determine….*

Most privative clauses are considerably shorter. Although there is much variation in content,[52] the tribunals listed below all have some form of privative clause:

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48 There appears to be no provincial statute expressly giving the power to decide questions of law but silent on questions of fact. Following the approach of the Supreme Court of Canada in cases such as *Cooper, supra*, this list does not include tribunals where, for example, an appeal lies on questions of law from decisions of the tribunal.

49 It does, however, contain a provision allowing the Board to refer to a panel of the Board a "question of law respecting the interpretation of this Code" [*emphasis added*]: s. 120 of the *Labour Relations Code*.

50 Judicial review is separate from appeal. A right of appeal exists only when expressly created by statute. The ability of the British Columbia Supreme Court to review decisions by an administrative tribunal is discussed at more length in a separate paper which addresses the question of the standard of review exercised by the court.

51 *Workers' Compensation Act*, R.S.B.C., chapter 492, s. 96 (1).

52 Privative clauses can contain one or more of the following: (i) a finality clause, (ii) a no *certiorari* clause and (iii) an exclusive jurisdiction clause; *cf.*, Jones and de Villars, *Principles of Administrative Law* (3rd ed.) (Carswell, 1999), pp. 694-695. For recent comments by the Supreme Court of Canada on the content of privative clauses, see, for example, *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 at para. 17; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 30; *Ivanhoe Inc. v.*

- BC Benefits Appeal Board
- Board of Parole
- Building Code Appeal Board
- Disaster Financial Assistance Appeal Board
- Employment Standards Tribunal
- Labour Relations Board
- Liquor Appeal Board
- Motor Carrier Commission
- Motor Dealers Customer Compensation Fund
- Public Service Appeal Board
- Residential Tenancy Arbitrators
- Travel Assurance Board
- Utilities Commission
- Workers' Compensation Board
- Workers' Compensation Board -- Appeal Division[53]
- Workers' Compensation Board – Criminal Injuries Section
- Workers' Compensation Board – Medical Review Panels

Although use of a privative clause reflects a legislative intent about the deference which the courts should accord to decisions of the tribunal, the simple use of any privative clause as the criterion for *Charter* jurisdiction leads to some unusual results. One reason for this is that several of the possible reasons for using a privative clause are unrelated to whether the legislature wanted to grant a power to determine questions of law broad enough to include *Charter* questions.[54] A possible option would be to discriminate between those tribunals with very strong privative clauses and those with comparatively weak clauses.

Another possible statutory indicator might be the existence of a statutory appeal from the tribunal to the courts. The following table lists those tribunals from which there are appeals to either the British Columbia Supreme Court or the Court of Appeal.

United Food and Commercial Workers, Local 500, 2001 SCC 47 at para. 24; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at paras. 24 and 27; and *Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union, Local 454*. [1998]1 S.C.R. 1079 at para. 59.

53 Although the Appeal Division of the Workers' Compensation Board enjoys the Board's general privative clause (section 96 of the *Workers Compensation Act*) for appeals on compensation claims, it has a less fulsome privative clause (section 212(3)) when hearing appeals under Part 3 of the *Act*.

54 For example, a private clause may be used when an important aspect of the board's decision making is the application of policy or special expertise. These factors probably explain the use of privative clauses for boards such as the Building Code Appeal Board and the Disaster Financial Assistance Appeal Board.

Statutory Appeals

To BC Supreme Court:	BC Marketing Board
	Coroner's Office
	Farm Practices Board
	Fire Commissioner
	Forest Appeals Commission
	Health Care and Care Facility Review Board
	Land Reserve Commission
	Medical Services Commission (only with respect to decisions under section 37 of the *Medicare Protection Act*
	Medical Services Commission – Health Care Practitioners Special Committee for Audit
	Mineral Tax Review Board
	Property Assessment Appeal Board
To Court of Appeal:	Commercial Appeals Commission
	Expropriation Compensation Board
	Labour Relations Board – Labour Arbitration Board
	Motor Carrier Commission
	Racing Commission
	Securities Commission
	Utilities Commission

Although there is some overlap with the previously discussed statutory indicators, the existence of a statutory appeal to the courts produces a quite different list of tribunals.

Is reliance solely on existing statutory provisions an appropriate tool for identifying which tribunals should have *Charter* jurisdiction? More than one academic commentator has questioned the wisdom of relying on statutory indicators of legislative intent:[55]

> *...we must refocus our attention on the substance of the problem, which is institutional capacity and accessibility of the decision maker, rather than the shadow of the intention of the Legislature as revealed through express or implied authority to decide questions of law.*

Non-statutory Criteria

If one rejects the use of existing statutory indicators as the sole tool for identifying which tribunals should have *Charter* jurisdiction, another mechanism must be used. There is a variety of non-statutory criteria which could be chosen:

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55 McAllister, "Administrative Tribunals and the *Charter: A Tale of Form Conquering Substance*", *supra*, a p. 133 (see also pp. 158 and 159).

- institutional competence of the tribunal to render decisions on complex legal issues and particularly on *Charter* issues
- expertise of the tribunal and specialized knowledge of its members
- procedural machinery available to the tribunal
- accessibility
- degree of respect enjoyed by the tribunal in the larger community
- stability and longevity of the tribunal

A number of the above criteria were discussed earlier in this paper. These and other criteria could be used independently or in conjunction with statutory indicators such as a privative clause or an express power to decide questions of fact and law.[56]

The Administrative Justice Project looks forward to receiving comment on the criteria for selecting those tribunals which should exercise *Charter* jurisdiction.

If one agrees that some but not all tribunals should have *Charter* jurisdiction, the selection of these tribunals raises interesting and potentially difficult questions.

5 PROCEDURAL AND REMEDIAL TOOLS

A number procedural and remedial matters should be addressed irrespective of what tribunals may have *Charter* jurisdiction.

Procedural Tools

Tribunals with Jurisdiction

If a decision is made that one or more tribunals should have *Charter* jurisdiction, several practical matters should be addressed. First, should the tribunal have a discretion to decline exercising its *Charter* jurisdiction? A closely related matter is whether the tribunal should have the statutory authority to refer a *Charter* issue to court.

Since it is difficult to envisage all future circumstances, cases may arise where it is clear to a tribunal that the most efficient and appropriate way of resolving a particular *Charter* question is to leave it for resolution by the court, even though the tribunal has the general power to decide the issue. Procedurally the matter could arrive in court either by way of judicial review or appeal from the tribunal's final decision, or by way of a reference to court. In the latter situation, the tribunal's hearing would be adjourned pending the outcome of the court reference. An advantage of giving

[56] For example, a selection of these criteria could be applied to a list of tribunals with a privative clause of some type.

a tribunal this discretion would be to allow it to deal with the exceptional cases where it concluded that it should not exercise its power to make a *Charter* decision.[57] A disadvantage of granting such a discretion is that it adds another issue for argument and decision by the tribunal.

Secondly, if one or more tribunals are to have *Charter* jurisdiction, consideration should be given to removing any possible doubt that notice must be given to the Attorney General prior to a tribunal dealing with the *Charter* issue. The *Constitutional Question Act* requires that the Attorney General be given notice when the validity or applicability of an enactment is challenged in "a cause, matter or other proceeding".[58] The purpose of the notice is to give the Attorney General (on behalf of the government) an opportunity to defend the validity of the provincial legislation. Although a decision of invalidity by an administrative tribunal does not have the strict legal effect of a declaration of invalidity by a court, it nonetheless can have serious implications. The wording in the *Constitutional Question Act* is broad enough to include tribunal proceedings; however, it should perhaps be amended to remove any lack of clarity that it applies to both court and tribunal proceedings.

Tribunals without Jurisdiction

In those cases where a tribunal does not have *Charter* jurisdiction, there is an issue whether the tribunal should be given the statutory power to refer the matter to court for resolution prior to the tribunal's hearing the case before it. At the present time, a party can (in appropriate circumstances) obtain a court order prohibiting a tribunal from proceeding with a hearing. Apart from the legal obstacles to obtaining an order of prohibition on judicial review, there is also the factor that an order of prohibition is useful only as a defensive tool. It gives no assistance to a party seeking to obtain a benefit on the basis that the statutory provision denying the benefit is constitutionally invalid. An appropriate legislative amendment could be made if it was decided that tribunals should be given the discretion to refer a *Charter* issue to the British Columbia Supreme Court.[59]

Remedial Tools

The range of remedies used by the courts when dealing with a legislative provision inconsistent with the *Charter* was discussed above. The most frequent remedy is simply a declaration that a

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57 *Cf.* Crane, *supra*, at p. 507, footnote 37; and Evans, *supra*, at p. 364.

58 R.S.B.C. 1996, c. 68, s. 8. Notice must be given to the attornies general of both British Columbia and Canada.

particular provision is invalid and inoperative. In the context of a decision by a tribunal, this would be a decision that a statutory provision was inoperative insofar as it applied to the facts of the case before the tribunal.

As discussed above, however, "striking out" a provision will not always provide an appropriate remedy. In some cases, reading in additional words will be required. The ability to add words to a legislative provision raises the constitutional propriety of *Charter* jurisdiction for tribunals in a more acute form than simply a jurisdiction to read down or strike out part of a legislative provision.[60] An argument can be made that there should be legislative guidance as to the extent of a tribunal's remedial powers for those tribunals with *Charter* jurisdiction. In the absence of an express statutory power to read in additional words, there is a good argument that tribunals, being creatures of statute, do not have that power.[61]

6 SUMMARY OF OPTIONS

The options with respect to *Charter* jurisdiction for administrative tribunals fall into three groups. The first consists of the primary options on the extent to which tribunals should have *Charter* jurisdiction. In addition, there are two groups of secondary options: (i) criteria for identifying selected tribunals and (ii) procedural and remedial matters.

Jurisdiction

The five primary options are as follows:

1. All tribunals have jurisdiction
2. No tribunals have jurisdiction
3. All tribunals have jurisdiction except for certain specified tribunals
4. No tribunals have jurisdiction except for certain specified tribunals
5. Status quo (courts decide the issue on a case by case basis)

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59 The legislative provision could be contained in a *Statutory Powers and Procedures Act* if one were enacted, or could be placed in a already existing statute such as the *Judicial Review Procedure Act*.

60 For a discussion of the propriety of a tribunal's reading words into a statute, see Crane, *supra*, at p. 506, footnote 35. See also Evans, *supra*, at pp. 365-366.

61 This matter is clouded, however, by the fact that the technical nature of the remedy is dependent on the linguistic structure of the legislative provision. If the statute begins by granting a benefit to everyone and then sets out an unconstitutional exception, striking out the exception expands the scope of the legislation. On the other hand, if the legislation grants a benefit to a specific group and that group is unconstitutionally narrow, striking out the provision will narrow the scope of the legislation (no one will receive the benefit).

Secondary Options

If a decision is made that at least some tribunals will have *Charter* jurisdiction, a number of other issues must be addressed.

Criteria for Identifying Selected Tribunals

There are two basic options for the identification of those tribunals which would have *Charter* jurisdiction.

Option 1: Rely on indicators in the existing wording of the enabling statute for a tribunal. The following are possible indicators:

- express statutory power to decide questions of law
- privative clause
- statutory right of appeal to either the British Columbia Supreme Court or the Court of Appeal

Option 2: Use non-statutory criteria, possibly in conjunction with statutory wording. Non-statutory criteria could include matters such as the institutional capacity and competence of the tribunal.

Procedural and Remedial Matters

The following options should be considered:

- For Tribunals with Jurisdiction
  - Give the tribunal a statutory discretion to decline exercising the jurisdiction and/or to refer the matter to court.
  - Amend the Constitutional Question Act to remove any possible doubt that notice must be given to the Attorney General in those cases where there is a Charter challenge to the validity of legislation.
- For Tribunals without Jurisdiction
  - Enact legislation allowing the tribunal to refer a *Charter* matter to court for determination before the tribunal hears the case before it.
  - Maintain the status quo concerning the availability of judicial review before the tribunal has heard the case.

The Administrative Justice Project looks forward to receiving comment on these options.

APPENDIX:

BRITISH COLUMBIA'S ADMINISTRATIVE JUSTICE AGENCIES

Note: This list of agencies is from tables appended to the Terms of Reference for the Administrative Justice Project.

Administrative Agency	Included Agencies or Programs	Responsible Minister
Agricultural Marketing Boards	BC Marketing Board, Broiler Hatching Egg Commission, Chicken Marketing Board, Cranberry Marketing Board, Egg Marketing Board, Grape Marketing Board, Hog Marketing Board, Milk Marketing Board, Mushroom Marketing Board, Sheep and Wool Commission, Tree Fruit Marketing Board, Turkey Marketing Board, Vegetable Marketing Commission	Agriculture, Food and Fisheries
BC Benefits Appeal Board	BC Benefits Tribunal	Human Resources
Board of Parole		Public Safety and Solicitor General
Building Code Appeal Board		Community, Aboriginal and Women's Services
Children's Commission		Attorney General and Minister Responsible for Treaty Negotiations
Commercial Appeals Commission	Appeals under the Company Act, Credit Union Incorporation Act, Financial Institutions Act, Mortgage Brokers Act, Real Estate Act, Society Act, Cemetery and Funeral Services Act, Consumer Protection Act, Credit Reporting Act, Debt Collection Act, Motor Dealer Act, Travel Agents Act, Pension Benefits Standards Act, Home Owner Protection Act	Public Safety and Solicitor General
Commissions of Inquiry under Inquiry Act		Attorney General and Minister Responsible for Treaty Negotiations
Community Care Facility Appeal Board		Health Services / Minister of State for Intermediate, Long Term and Home Care
Coroner's Office		Public Safety and Solicitor General
Criminal Record Review Adjudicators		Public Safety and Solicitor General
Criminal Record Review Appeal Board		Public Safety and Solicitor General
Disaster Financial Assistance Appeal Board		Public Safety and Solicitor General
Electrical Safety Appeal Board		Community, Aboriginal and Women's Services
Elevating Devices Appeal Board		Community, Aboriginal and Women's Services
Employment Standards Tribunal		Skills Development and Labour

Administrative Agency	Included Agencies or Programs	Responsible Minister
Environmental Appeal Board	Appeals under the Commercial River Rafting Safety Act, Pesticide Control Act, Waste Management Act, Water Act, Wildlife Act and Health Act	Water, Land and Air Protection
Expropriation Compensation Board		Attorney General and Minister Responsible for Treaty Negotiations
Farm Practices Board		Agriculture, Food and Fisheries
Financial Institutions Commission		Finance
Fire Commissioner		Community, Aboriginal and Women's Services
Forest Appeals Commission		Forests
Forest Practices Board		Forests
Gaming Commission		Public Safety and Solicitor General
Gas Safety Appeal Board		Community, Aboriginal and Women's Services
Health Care and Care Facility Review Board		Health Services
Human Rights Tribunal	Human Rights Commission, Human Rights Advisory Council	Attorney General and Minister Responsible for Treaty Negotiations
Labour Relations Board	Industrial Inquiry Commissions, Labour Arbitration Boards	Skills Development and Labour
Land Reserve Commission		Sustainable Resource Management
Liquor Appeal Board		Public Safety and Solicitor General
Manufactured Home Park Dispute Resolution Committee		Public Safety and Solicitor General
Mediation and Arbitration Board		Energy and Mines
Medical and Health Care Services Appeal Board		Health Services
Medical Services Commission	Health Care Practitioners Special Committee for Audit	Health Services
Mental Health Review Panels		Health Services
Mineral Tax Review Board		Provincial Revenue
Motion Picture Appeal Board		Public Safety and Solicitor General
Motor Carrier Commission		Transportation
Motor Carrier Reconsideration Panel		Transportation
Motor Dealers Customer Compensation Fund		Competition, Science and Enterprise
Power Engineers and Boiler and Pressure Vessel Safety Appeal Board		Community, Aboriginal and Women's Services
Private Post Secondary Education Commission		Advanced Education
Property Assessment Appeal Board		Community, Aboriginal and Women's Services

Administrative Agency	Included Agencies or Programs	Responsible Minister
Property Assessment Review Panel		Community, Aboriginal and Women's Services
Public Service Appeal Board		Management Services
Racing Commission		Public Safety and Solicitor General
Residential Tenancy Office		Public Safety and Solicitor General
Review Board (Criminal Code)		Attorney General and Minister Responsible for Treaty Negotiations
Securities Commission		Competition, Science and Enterprise
Travel Assurance Board		Public Safety and Solicitor General
Utilities Commission		Energy and Mines
Workers' Compensation Board	Medical Review Panels, Review Board, Appeal Division, Criminal Injuries Compensation Section	Skills Development and Labour

Reviewing Original Decisions:

Guiding Principles and Options

A Background Paper

Prepared by

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for

Administrative Justice Project

Ministry of Attorney General

Victoria, British Columbia

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Preface

This background paper is one of several to be released as part of the Administrative Justice Project. The project, initiated by the Attorney General, is a broad legal and policy review of the system of administrative justice. Its objectives are to ensure that:

- administrative agencies meet the needs of the people they serve;
- their administrative processes are open and transparent;
- their mandates are modern and relevant;
- government fulfills its obligations by providing the legislative and policy framework administrative agencies require to carry out their independent mandates effectively.

The Terms of Reference for the background papers are to ensure that:

- legislation is based, to the greatest extent possible, on a principled, consistent and clear articulation of the role and powers of administrative agencies;
- administrative agencies possess the procedural authority to respond flexibly, effectively and efficiently to resolve disputes by adjudicative or other means;
- compelling rationales exist for more than one "layer" of administrative appeal or review;
- courts and parties have clearer direction regarding the legislature's intention concerning matters such as the "standard of review" where a decision is challenged on judicial review or appeals.

The intent of this and the other background papers is to facilitate informed discussion about steps government can take to assist the work of administrative agencies. The papers provide a focus for this discussion and, it is hoped, will result in dialogue and debate within the administrative justice community. Comment will be taken into account by the Administrative Justice Project when it drafts a White Paper for release in 2002. There will be a further opportunity for public input after the White Paper is released, before government decides on what steps it will take.

If the reader is interested, written comments may be forwarded to the author at the following address prior to May 15, 2002.

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EXECUTIVE SUMMARY

A wide range of adjudicative decisions is made by government officials and administrative tribunals. These decisions have a profound effect on individuals, businesses and the environment. For example:

- the tax assessment for a commercial property can have a significant financial impact on a business,
- decisions about forest practices have direct environmental and financial impacts,
- a human rights decision arising from a denial of employment or rental accommodation because of race is significant to the person concerned and to the employer or landlord. It can also have a broader normative effect on the future conduct of individuals.

Since it is inevitable that errors will occur, there is a strong public interest in having appropriate mechanisms to correct these errors.

One of the difficulties in designing a review mechanism which is both appropriate and will work as hoped for is the need to bring together a number of disparate elements. A broad range of policy, legal and practical factors all need to be considered and taken into account. This paper is an attempt to bring together these different elements and to deal with them in a comprehensive and organized way. After receiving comment on the current paper, the Administrative Justice Project anticipates releasing a revised version for use as a guide book to assist those responsible for designing or modifying mechanisms for reviewing decisions made within the administrative justice system.

There are three broad ways in which government and tribunal decisions can be reviewed and corrected: internal review, appeal and judicial review. Certain decision making processes can also be reviewed by the Ombudsman but he does not have the power to alter individual decisions.

An enormous spectrum of matters needs to be taken into account when designing a structure for reviewing original decisions. In addition, there are a significant number of issues on which decisions should be taken in the design process. The following five step process will assist in ensuring that all relevant matters are addressed:

Step 1: Identify the policy goals for the proposed review structure.

Step 2: Identify those individual characteristics of the system under review that are relevant to the review structure.

Step 3: Take into account three general principles: achieve legislative clarity wherever possible, avoid unnecessary diversity and seek proportionality among different review mechanisms.

Step 4: Make the macro-structural choice of process between internal review, appeal or reliance solely on judicial review (or a combination of internal review and appeal).

Step 5: Make micro-structural decisions on technical matters relevant to the broad type of review selected in step four.

Policy Goals

The identification of policy goals is an important first step as it determines what the review process should achieve. There are a number of goals for any regime that reviews original decisions.

- fair and just decisions
- consistency
- timeliness
- finality
- accessibility
- cost efficiency

Although obtaining fair and just decisions is the most important consideration, none of these goals is absolute. In some cases, one goal must be weighed against another goal but each goal should be sought to the greatest extent possible.

Program Area Characteristics

The second step in the design process is to identify key characteristics of the environment within which the review structure will operate. A review process which works in one program area may not be appropriate in a different area. These characteristics include factors such as the following:

- significance of the decision under review
- the users (characteristics such as education, financial resources and access to lawyers)
- extent to which the issues are primarily legal, or conversely, the role of policy in reaching an appropriate decision
- whether there is a need for special expertise

- extent of desire to limit opportunities for political input
- volume of cases
- impact on the workload of the courts if there is no appeal to an administrative tribunal
- culture or environment of the program area within which the tribunal operates
- available resources.

Three General Principles

Three general principles should be kept in mind when making design decisions. First, legislative clarity is preferable to uncertainty about how a particular review scheme should operate. Second, unnecessary diversity between review structures in different program areas should be avoided. Third, review mechanisms should be proportionate to the gravity and complexity of the issues at stake.

Choice of Review Process

Step four of the process requires consideration of the advantages and disadvantages of each of the three broad types of review. For example, an advantage of internal review is that it can be an easily accessible, quick and cost effective way of rectifying errors. On the other hand, it is sometimes perceived not to be as impartial as an appeal to an external appeal body. This policy analysis informs the choice whether to use internal review or appeal, or to rely solely on judicial review.

Sometimes it is appropriate to have multiple layers of review despite the resulting cost and delay in achieving finality. A combination of a single layer of internal review coupled with a single layer of appeal is appropriate in a number of cases. For appeals to court, it is sometimes appropriate to restrict the ability to take a subsequent appeal from the British Columbia Supreme Court to the Court of Appeal. With the possible exception of program areas with a very high volume of cases, multiple layers of internal review and/or multiple layers of tribunal appeal are not appropriate. In the case of high volume programs, several options exist for achieving fair and just decisions in a cost effective and timely way.

Technical Matters

Step five requires consideration of a wide range of micro-structural issues which should be addressed once the larger decision has been made whether to utilize internal review, appeal or to

rely solely on judicial review. For example, the following are some of the issues which need to be addressed when a right of appeal is created:

- Will the appellate entity be a tribunal, court or minister?
- What should be the grounds of appeal?
- What remedies should the appeal body have?
- How much (if any) new evidence should be heard on the appeal?
- In what circumstances should an appeal board have a power of reconsideration?

In addition to the legislative framework for a review structure, a variety of non-statutory matters are critical to the successful operation of a review scheme. These matters are beyond the scope of this paper but include items such as the quality of the members appointed to an appeal tribunal and the provision of adequate staff and financial resources.

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1 INTRODUCTION

The Issue

The regulatory and administrative role of government has grown enormously during the past century. Hundreds, if not thousands, of new decisions are made daily about issuing and canceling licences and permits, providing government benefits and a host of other matters. These decisions have a profound effect on individuals, businesses and the environment. For example:

- the tax assessment for a commercial property can have a significant financial impact on a business,
- decisions about forest practices have direct environmental and financial impacts,
- a human rights decision arising from a denial of employment or rental accommodation because of race is significant to the person concerned and to the employer or landlord. It can also have a broader normative effect on the future conduct of individuals.

As a matter of good public administration, mechanisms are needed for reviewing these adjudicative decisions in those cases where that is appropriate. This paper examines the guiding principles and options that should be considered when designing structures for reviewing original decisions.

The statutes of British Columbia contain a kaleidoscopic array of procedures for reviewing original decisions by government. In many cases, there is no apparent reason why a specific review mechanism was chosen or, alternatively, a decision was made that there should be no statutory review mechanism. British Columbia is no different in this respect than most other provinces. One reason for the present situation is that decisions to create a new review or appeal mechanism not infrequently are made under significant time constraints as well sometimes as political constraints.

A second reason is that little has been written about designing review structures. There are no guidebooks setting out a systematic process for creating a review scheme. One of the difficulties in designing a review mechanism which is appropriate and will work as hoped for is the need to bring together a number of disparate elements. A broad range of policy, legal and practical factors all need to be taken into account. This paper is an attempt to bring together these different elements and to deal with them in a comprehensive and organized way. Although the

focus of this paper is strictly on reviewing decisions which have already been made, certain aspects of the policy discussion are also relevant to the design of processes for making original decisions.

After receiving comment on the current paper, the Administrative Justice Project anticipates releasing a revised version as a guide book to assist those responsible for designing or modifying mechanisms for reviewing decisions made within the administrative justice system.

Policy Reasons for Reviewing Decisions

Why should we be concerned about a mechanism for reviewing decisions? All review or appeal schemes have obvious drawbacks. One of the goals of any system of justice is to reach finality so that the parties can continue carrying on their lives. Appeals delay the final resolution of legal disputes. They also create expense for the parties and more generally for the public who fund the adjudicative system.

Despite the disadvantages of appeals, there is general agreement that the interests of justice and fairness outweigh the detriments inherent in even a well functioning appeal structure. The fundamental reason for reviewing decisions is that errors are made.[1] Even the best intentioned and well informed decision maker will err occasionally. In some cases, a government decision maker is faced by a high volume of cases, time constraints and sometimes a lack of resources to make a fully considered decision.[2]

Error and the desire to correct it is the reason for the existence of appeals from trial court decisions. For example, a right of appeal on questions of both fact and law exists from decisions

---

1 The Kerr Report in Australia made this point as follows:

> "...there is an established need for review of administrative decisions. We have not thought this to be a matter of real debate....It is the possibility of error that demonstrates the need for review. At this point it is sufficient to refer to the cases which presently come before the Courts and before administrative tribunals under existing procedures to show that error does occur in the administrative process.

(Commonwealth Administrative Review Committee, *Report*, Parliament of the Commonwealth of Australia, 1971, Parliamentary Paper No. 144, p. 3). In a similar vein, the Canadian authors Jones and de Villars have written:

> "The principles of good public administration usually require that at least one level of appeal exist with respect to any delegate's decision."

(*Principles of Administrative Law* (3rd ed.) (Toronto, 1999), p. 528.)

2 This point was made by the Australian Administrative Review Council in its Report No. 39, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Canberra, 1995), p. 21. This report is available at http://www.law.gov.au/publications/better_decisions and http://www.law.gov.au/aghome/other/arc/.

of the Provincial Court made under the *Small Claims Act*.[3] This need for some form of appeal mechanism has been recognized for several centuries.[4] Error is also the primary reason why there is a second level of appeal in the court system: i.e., appeals from the Court of Appeal to the Supreme Court of Canada.[5]

Implicit in this discussion is the underlying assumption that the correction of errors is a good thing. Whatever one's views about Dicey's formulation of the rule of law doctrine,[6] most Canadians will agree that there is a strong public interest in ensuring that government (and adjudicative) decisions are made in accordance with the relevant law.[7]

Scope and Structure of Paper

This paper explores the various mechanisms for reviewing and correcting certain categories of government decisions, in particular those made within the administrative justice system. Although existing review and appeal structures are referred to, the paper does not propose specific changes to these statutory regimes. Its goal is more comprehensive: to describe the considerations and options that should be taken into account when designing a structure for the review of an original decision.

---

3 The appeal lies to the British Columbia Supreme Court: *Small Claims Act*, R.S.B.C. 1996, c. 430, ss. 5 and 12(a).

4 The present structure of court appeals dates largely from the 19th century. Since the *Judicature Acts* in the 1870's, English court decisions have been appealable to the Court of Appeal and then to the Appellate Committee of the House of Lords. (This structure describes the process for appeals from civil decisions of the courts equivalent to the British Columbia Supreme Court.) For a fuller discussion of the history of appeals in England, see, for example, J.H. Baker, *An introduction to English legal history* (London, 1971), Chapter 7.
A similar process was adopted in British Columbia. From at least 1885, decisions of a Supreme Court judge were appealable to the Full Court sitting in banc: *Appellate Jurisdiction Act, 1885*, 48 Vict. (1885), c. 5; see also *Judicature Act, 1879*, 42 Vict., c. 12, s. 5-7. The jurisdiction of the Full Court was transferred to the newly created Court of Appeal in 1907: *Court of Appeal Act, 1907*, Stats. B.C. 1907, c. 10. Since the late 1800's, there have been appeals from the provincial appeal courts to the Supreme Court of Canada. Until the late 1940's, there was also an appeal from the Supreme Court of Canada to the Judicial Committee of the Privy Council (sitting in London, England).

5 Similar second level appeals exist in England to the Appellate Committee to the House of Lords and in the United States to the Supreme Court of that country. In federal states such as Canada and the United States with individual provincial (or state) courts of appeal, an additional reason for a national appellate court is to increase uniformity in the law across the country.

6 The traditional rule of law can be summarized as the rule that everyone, both individuals and the state, must comply with the law of the land as interpreted by the courts. Put simply, government and its officials cannot act outside the law; no one is above the law. For two of the many discussions and critiques of Dicey's rule of law doctrine, see P.P. Craig, *Administrative Law* (3rd ed.) (London, 1994), pp. 4-17 and Ontario, *Royal Commission Inquiry into Civil Rights* (the McRuer Report), vol. 1, chap. 3.

The paper begins by describing the different types of review mechanisms. The following section describes a five step process for designing a review structure in a particular program area. The paper then addresses each of these five steps in turn:

- identifying policy goals
- identifying relevant characteristics of the program area
- taking into account certain general principles
- choosing between internal review, appeal or relying solely on judicial review as the tool for reviewing decisions
- making decisions on subsidiary technical matters relevant to the chosen type of review process.

The final sections of the paper address multiple layers of review and non-statutory matters which can have an impact on how a review structure works in practice.

2 TYPES OF REVIEW: DEFINITIONS AND EXAMPLES

Overview

This section of the paper provides the background to later sections, which address the underlying principles and technical options available when designing a structure for reviewing an original level decision. It sets out some general concepts and outlines the different types of review. Although it discusses the law on a few specific issues, it does not address the pros and cons of particular design choices. That discussion is later in the paper, after an examination of the policy goals for review structures.

"Review" is a word of many meanings. In this paper, it is used in its broadest sense as referring to any means of revisiting a decision.[8]

Review of original decisions can be viewed from two perspectives.

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7 This statement deliberately leaves to one side the issue of who should be the ultimate arbiter of whether a decision is legally appropriate.

8 "Review" can also be used in a number of narrower senses. Sometimes the word is used to refer to a reconsideration by the original decision maker. In contrast, review decisions by the Workers' Compensation Review Board are in many respects appeal decisions.

Procedural Perspective

From a procedural perspective, there are three broad types of review.

The first is internal review. Where a power of internal review exists, the original decision is revisited and possibly changed by someone within the ministry or agency which made the decision. Internal review can include review within a ministry by someone other than the original decision maker as well as reconsideration by the original decision maker.

The second and most important type of review is appeal. An appeal is to someone other than the original decision maker. Appeals exist only when created by statute.

The third type of review is judicial review. This is a tool used by the courts to review the legality of the original decision.[9] It derives from the supervisory jurisdiction of the superior courts over administrative tribunals.[10]

These three types of review are discussed in more detail below.

Functional Perspective

Review can also be considered from the perspective of its purpose or function. In some cases, review focuses solely on the legality of the original decision. In this type of review, the only question for the reviewing body is whether the original decision maker acted outside its jurisdiction or otherwise committed an error of law. The wisdom or correctness of the decision is not a concern (except to the extent that the decision is so wrong that the decision maker committed an error of law or acted outside its jurisdiction[11]). This type of review is what occurs on judicial review and when there is a statutory appeal restricted to questions of law.

At the other end of the spectrum is the Australian concept of "merits review." This involves a complete reconsideration of the case. The focus is on reaching the best possible decision[12] at the time of the review; the focus is not on whether the original decision maker reached an

---

9 This matter is discussed more fully below at p. 16.

10 This inherent supervisory jurisdiction also extends over inferior courts such as the Provincial Court, except where removed by statute.

11 This matter is discussed further below. For a detailed discussion, see the Administrative Justice Project's Background Paper *Standard of Review on Judicial Review or Appeal* by Frank A.V. Falzon, released in December 2001. This paper is available at: http://www.gov.bc.ca/ajp/rpts/.

12 *Better Decisions, supra*, para. 2.18.

acceptable decision. The Australian Administrative Review Council described merits review as follows in its report entitled *Better Decisions*:[13]

> *Merits review is the process whereby an administrative decision of the government is reviewed "on the merits": that is, the facts, law and policy aspects of the original decision are all reconsidered afresh and a new decision -- affirming, varying or setting aside the original decision -- is made. Merits review is characterised by the capacity for substitution of the decision of the reviewing person or body for that of the original decision maker.*
>
> *Merits review is often described as a process by which the person or body reviewing the decision "stands in the shoes" of the original decision maker....This is because the reviewing person or body, like the original decision maker, must make findings of fact and apply the relevant law to those findings to make a decision, having regard also to any relevant government policy.*

The council notes later that the "stands in the shoes" metaphor is not entirely accurate since the reviewing body "will often be asked to consider new or more detailed information" not considered by the original decision maker.[14] An important feature of the Australian merits review is that its primary purpose is to reach the "correct and preferable" decision at the time of the review.[15] The goal is not just to reach a correct decision; it is to reach the best decision.

This functional categorization of review mechanisms cuts across the procedural categories. Full merits review can be available in both internal review and external appeal schemes -- depending on how these schemes are designed. Review strictly for legality is the hallmark of judicial review and appeals restricted to questions of law.

Review for legality and merits review are opposite ends of the spectrum of review functions. Other types of review function lie between these two extremes.

Internal Review

Characteristics

Internal review provides a second look at a decision from within the ministry or other agency which first made the decision. It is a process which takes place after the decision has been made. Internal consultation before a decision has been made is a different issue.[16] Depending

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13 *Supra*, paras. 2.3 and 2.4.

14 *Ibid.*, paras. 2.54 and 2.55.

15 *Ibid.*, paras. 2.9, 2.10 and 2.62; see also para. 2.5.

16 Internal consultation before a decision is made can take several forms. For example, a statutory decision maker might use a subordinate to assist in collecting information and, where appropriate,

upon any policy or legal limitations on the scope of the internal review, it can result in a confirming, varying or reversal of the original decision.

The breadth of an internal review can vary from a mere paper review of the material before the original decision maker to a process where the concerned person has an opportunity to present new evidence and submissions to the person conducting the internal review.

Internal review can be structured in a variety of ways. It can be undertaken by the original decision maker (i.e., reconsideration) or can be done by a different person (or group of persons) within the ministry or agency. In this latter situation, the internal review verges on being an appeal.[17]

Reconsideration

In its strict sense, reconsideration refers to a review by the original decision maker. Subject to certain common law exceptions, a statutory decision maker does not have power to reconsider its decision unless that power is granted by statute. Once a statutory decision is made, the decision maker is said to be *functus officio*: he has performed his office -- he cannot do it again.[18]

The following tribunals have an express statutory power of reconsideration:

- Board of Parole
- Employment Standards Tribunal
- Labour Relations Board
- Land Reserve Commission
- Mediation and Arbitration Board
- Motor Carrier Commission
- Residential Tenancy Arbitrators
- Utilities Commission
- Workers' Compensation Board
- Workers' Compensation Board -- Appeal Division
- Worker's Compensation Board -- Criminal Injuries Section

A few statutory decision makers also have an express power to revisit an earlier decision.[19]

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providing a preliminary analysis of the issues. Where it occurs, care must be taken that the process complies with the requirements of natural justice or procedural fairness as they apply to the particular decision making process.

17 An example of this is the "review" powers in sections 143 – 145 of the *Forest Act*, R.S.B.C.1996, c. 157, which create what could be seen as an appeal mechanism within the ministry.

18 See, for example, *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at paras. 19-20.

19 For example, the minister under the *Heritage Conservation Act*, R.S.B.C. 1996, c. 186, can revisit his approval of a site alteration permit in certain cases (s. 12(6)).

In addition to any statutory power of reconsideration, the common law allows a tribunal or other decision maker to revisit a decision in certain limited circumstances.[20] A useful summary of the law is provided by Macaulay:[21]

> *when there is legislative authority to do so, which may be found:*
>
> *i) in an express legislative power to reconsider,*
>
> *ii) to be implied by other provisions or from the overall structure of the legislation, or*
>
> *iii) to be implied by the nature of the decision-making power in question;*
>
> *when it is necessary to correct a clerical error, an accidental error or omission, or an ambiguity in the decision;*
>
> *when the decision mandated by statute has not yet been made, or the decision made is void or voidable for lack of jurisdiction (including breaches or the principles of natural justice or fairness), or there remains an issue outstanding; or*
>
> *where the decision in question was procured by reason of fraud, mental disability or some other circumstance which calls its integrity into question.*

Two points are worth noting. First, a breach of natural justice in the process leading to the original decision creates a jurisdictional nullity, which can be reconsidered under the *Chandler* criteria. Secondly, as a general rule, a tribunal or other decision maker does not have power to reconsider simply because it later concludes that it reached a wrong decision:[22]

> *As a general rule, once...a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances.*

There are nonetheless instances where the courts have upheld reconsideration by a tribunal because of new evidence or circumstances.[23] The continuing litigation around this issue reflects

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20 See *Chandler, supra.*

21 Macaulay and Sprague, *Practice and Procedure Before Administrative Tribunals* (2001), para. 27A.2(a).

22 *Chandler, supra*, para. 20. After discussing some of the circumstances in which a tribunal may revisit an earlier decision, the Supreme Court of Canada also stated (para. 23):

> "If...the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection."

23 In *Grier v. Metro Internation Trucks Ltd* (1996), 28 O.R. (3d) 67 (Ont. Div. Ct.), the factual error in the first decision was characterized as being so significant that it rendered the original decision a jurisdictional nullity (and thus within one of the *Chandler* exceptions); the original decision had been based on a factual assumption which both parties had erroneously believed to be correct.

the tension between the need for finality and certainty and the desire to have fair and just decisions reached in as efficient a manner as possible.

Common law powers of reconsideration are apparently not excluded where the empowering statute expressly grants a power of reconsideration in limited but different circumstances.[24]

Appeal

Characteristics

An appeal is a review by someone other than the original decision maker. Appeals are typically to a tribunal at arm's length from government or to the courts. Some statutes also provide for appeals to the minister responsible for the ministry within which the decision was originally made[25] or to some other person in that ministry.[26] In the case of appeals to someone within the same ministry, it can be a moot point whether they are best described as an appeal or a form of internal review.

There is considerable variety in rights to appeal to court. When the appeal lies to the British Columbia Supreme Court, the appeal usually if not always exists as of right.[27] When the appeal is directly from a tribunal to the Court of Appeal, leave of the Court often has to be obtained before the appeal can be actually commenced.[28] In those cases, where the appeal is initially to the British Columbia Supreme Court, restrictions are sometimes placed on the normal right to appeal[29] from that court to the Court of Appeal. Leave from the Court of Appeal is required before an appeal may be commenced.[30]

---

24 *Atchison v. Workers' Compensation Board*, 2001 BCSC 1661. Section 96.1(2) of the *Workers Compensation Act* gives the Appeal Division a reconsideration power where new evidence has come to light. The court rejected the argument that this legislative provision ousted the common law ability of a tribunal to reconsider its decision in certain other circumstances (paras. 15-19).

25 E.g., *Social Service Tax Act*, R.S.B.C. 1996, c. 431, s. 118.

26 E.g., *Gas Safety Act*, R.S.B.C. 1996, c. 169, s. 25.

27 I.e., leave to appeal is not required before the appeal can be initiated: e.g. *Medicare Protection Act*, R.S.B.C. 1996, c. 286, s. 43(1).

28 E.g., *Securities Act*, R.S.B.C. 1996, c. 418, s. 167(1). In certain cases, some but not all of a tribunal's decisions are appealable.

29 *Court of Appeal act*, R.S.B.C. 1996, c. 77, s. 6(1)(a).

30 E.g., *Medicare Protection Act*, R.S.B.C. 1996, c. 286, s. 43(2). Another possibility is to borrow from the court system and remove entirely the right of appeal to the Court of Appeal from a particular decision of the British Columbia Supreme Court. A decision of the Provincial Court made under the *Small Claims Act* can be appealed to the British Columbia Supreme Court but no further; the normal right (under the *Court of Appeal Act*) to appeal a Supreme Court decision to the Court of Appeal has been removed by section 13(2) of the *Small Claims Act*, R.S.B.C. 1996, c. 430.

Appendix A provides data on the nature of the appellate body to which an appeal lies from tribunals covered by the Administrative Justice Project. It does not include data on appeals from other tribunals[31] or from other government decision makers.[32]

The scope or grounds of appeal vary from merely reviewing legal questions all the way to a complete review of all the merits: questions of fact and law as well as the exercise of discretion.[33] In some cases, the statute states that the appeal is limited to questions of law. This happens most frequently when the appeal is to court[34] but also occurs in the case of at least two tribunal appeals.[35] In a few cases, the appeal provision states that the appeal is on questions of both fact and law.[36] In the majority of cases, however, the statute does not expressly address the grounds of appeal. This is the broadest scope of appeal since it typically allows review of a discretion exercised by the original decision maker.[37]

A variety of remedial authority can be given to an appellate tribunal. The fullest remedy is where the appellate entity can make any decision which the original decision maker could have made. This is the primary remedial power vested in appeal courts[38] and is available to most appeal tribunals under their empowering legislation. A few tribunals, however, have a more restricted remedial power. For example, the BC Benefits Appeal Board is limited to confirming or reversing

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31 For example, tribunals of self-regulated professions are not included. A list of agencies included in the Terms of Reference of the Administrative Justice Project is available at <http://www.gov.bc.ca/ajp/terms/ajp_agencies.htm>.

32 For example, section 102 of the *Health Act* creates a right of appeal to the British Columbia Supreme Court from orders made under that *Act* by medical health officers and others.

33 Some types of decision require (or permit) little exercise of discretion if a certain set of facts is found to exist. On the other hand, some decision makers have the obligation to make discretionary judgments. For example, section 12(1) of the *Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267, gives the general manager a discretion to determine and take into account the "public interest" when deciding whether to issue a licence for the sale of liquor. His discretion also extends to imposing appropriate terms and conditions on the licence. Remedial powers are frequently discretionary. For example, under section 15(2) of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286, the Medical Services Commission has considerable discretion about the choice of action it will take if it is satisfied that certain events have happened in relation to a practitioner.

34 E.g., Forest Appeals Commission and the Mineral Tax Review Board. In the case of appeals from the Mineral Tax Review Board (as well as the Property Assessment Appeal Board), the appeals are by way of stated case.

35 Liquor Appeal Board and BC Benefits Appeal Board.

36 Employment Standards Tribunal, Forest Appeals Commission, Public Service Appeal Board and Workers' Compensation Board – Appeal Division.

37 The extent, however, to which the appellate body will interfere with the exercise of discretion by the original decision maker depends on the amount of deference (if any) accorded by the appeal body to the original decision maker. See the discussion below on the standard of review at p. 14.

38 See *Court of Appeal Act*, R.S.B.C. 1996, c. 77, s. 9(1)(a) and *Supreme Court Act*, R.S.C. 1985, c. S-19, s. 45.

the decision under appeal.[39] In addition to other remedial powers, some tribunals have the power to remit a matter back for reconsideration by the original decision maker.[40] In a few cases, legislation is silent on the remedial powers of an appellate tribunal.[41]

Two further topics warrant separate consideration.

Modes of Appeal (How Much New Evidence?)

Should the appellate decision maker focus on the evidence and material considered by the original decision maker or should she consider additional evidence which the appellant may want her to take into account? There is a range of modes of appeal.

In one type of appeal, the appellate body considers only whether the original decision maker made the correct decision based upon the material in front of her. This is referred to as a pure appeal or an appeal on the record.[42] At the other end of the spectrum is an appeal *de novo* (or trial *de novo*). In this type of appeal, the appellate body starts from the very beginning by hearing the evidence afresh. The Court of Appeal has described the difference between a pure appeal and a *de novo* appeal as follows:[43]

> *A trial de novo ignores the original decision in all respects, except possibly for the purposes of cross-examination. A true appeal focuses on the original decision and examines it to determine whether it is right or wrong, flawed or unflawed.*

In between these two ends of the continuum is a range of hearings where varying degrees of new evidence may be considered[44] but the underlying issue remains whether the original decision is correct or should be reversed or varied in some way.

In the absence of a contrary indication in the legislation creating the appeal, the strict law is that a statutory appeal is to be conducted as an appeal on the record.[45] Put another way, there is

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39 *BC Benefits (Appeals) Act*, R.S.B.C. 1996, c. 25, s. 5(7).

40 E.g., the Environmental Appeal Board: *Waste Management Act*, R.S.B.C. 1996, c. 482, s. 47(a).

41 E.g., Community Care Facility Appeal Board: *Community Care Facility Act*, R.S.B.C. 1996 c. 60; Although this *Act* in section 15(6) references a number of the powers of the Commercial Appeals Commission, these powers do not include the remedial powers in section 18 of the *Commercial Appeals Commission Act*, R.S.B.C. 1996, c. 54.

42 The "record" consists generally of the decision by the original decision maker as well as the evidence and submissions considered by her.

43 *Dupras v. Mason*, B.C.C.A., November 3, 1994, Vancouver Registry Nos. CA016932, etc., para. 15 *per* Lambert J.A. (writing for a panel of five justices of appeal).

44 The criteria for whether new evidence should be admitted can extend from the relatively strict rule used by the Court of Appeal to a considerably laxer standard.

power to conduct an appeal *de novo* only where that power is given by statute. A few tribunals have a clear power to conduct *de novo* appeals.[46] Since most of the remaining appellate tribunals have a power to compel the production of evidence, they clearly have the power to conduct something other than an appeal purely on the record. Many appeal tribunals conduct what is sometimes referred to as a "rehearing."[47] This term is used to describe a hearing where considerable new evidence is heard but the focus remains on whether the original decision was incorrect.[48]

Standard of Review

To what extent should the appellate body give deference to the original decision maker rather than make what it feels is the best decision? Like other matters such as grounds of appeal and how much new evidence can be heard on the appeal, the standard of review affects the ability (and willingness) of an appellate body to second guess the original decision maker.

The law on this issue is examined in detail in a background paper previously released by the Administrative Justice Project: "Standard of Review on Judicial Review or Appeal" by Frank A.V. Falzon.[49] Although the issue can arise in the case of appeals to a tribunal, it has greater practical importance when the appeal is to a court.

The courts use varying degrees of deference when hearing appeals (or judicial reviews) from a tribunal:[50]

> *The various standards of review are properly viewed as points occurring on a spectrum of curial deference. They range from patent unreasonableness at the*

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45 *Kucher (c.o.b. Webster's Coroner Child Care Centre) v. Benson*, January 23, 1995, B.C.S.C., Vancouver Registry No. A943253, para 43; *Van Unen v. W.C.B.*, 2001 BCCA 0262 at paras. 40-41; and *Wilson v. Canada (Indian Registry, Registrar)*, November 5, 1999, B.C.S.C., Vancouver Reg. No. A982935 at paras. 11-15; *McKenzie v. Mason*, October 2, 1992, B.C.C.A., Vancouver Registry Nos. CA014197 and CA014248; *Dupras, supra.*

46 The Environment Appeal Board has the power "to conduct an appeal by way of a new hearing": *Pesticide Control Act*, R.S.B.C. 1996, c. 360, s. 15(6). The courts have held that the Property Assessment Appeal Board has an inquisitorial function and must base its decision on all the evidence presented to it: *British Columbia (Assessor of Area No. 10 – Burnaby/New Westminster) v. Haggerty Equipment Co.*, May 30, 1997, B.C.S.C., Vancouver Reg. No. A970220. Conversely, there is one tribunal where the statute is explicit that the appeal is on the record: Liquor Appeal Board.

47 *Cf.* Evan, Janish, Mullan and Risk, *Administrative Law* (1995) (4th ed.) at p. 609.

48 Anecdotal information suggests that at least some of these Boards conduct *de novo* appeals.

49 The paper addresses the possibility of statutory clarification of the standard of review; it is available at the Administrative Justice Project's website: http://www.gov.bc.ca/ajp/rpts/.

50 *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36 at para. 24.

> *more deferential end of the spectrum, through reasonableness simpliciter, to correctness at the more exacting end of the spectrum.*

At the risk of oversimplifying a complex area of the law, the courts apply a "pragmatic and functional" approach to determine the appropriate level of deference intended by the legislature:

> *There are four factors that are used to determine the appropriate degree of curial deference: (i) privative clauses; (ii) relative expertise of the tribunal; (iii) the purpose of the Act as a whole and the provision in particular; and (iv) the nature of the problem: a question of law or fact? None of the four factors is alone dispositive....*

The existence of a right of appeal is the converse of a privative clause. A right of appeal is a factor indicating less deference than might otherwise be appropriate[51] but, like all the other factors, it is not determinative. Notwithstanding a right of appeal, courts sometimes grant more deference than exists under the correctness standard.[52]

Existing Diversity

There is enormous variety in the structure of appeals. In some cases the reason for a particular choice is apparent; in other cases, historical accident is probably the reason. This situation is not different from other jurisdictions. In 1968, Chief Justice McRuer wrote in his Ontario Royal Commission Report:[53]

> *Our survey of statutory appeals, which we shall discuss in detail later, has indicated that there is no uniformity and that constitutional principles which ought to govern have not been applied.*
> ...
> *There is an apparently inexplicable variation in the right of appeal from decisions of tribunals in the same class....*

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51 *E.g., Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at para. 49; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] S.C.R. 982 at para. 30; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] S.C.R. 748 at para. 46; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] S.C.R. 557 at paras. 62-63.

52 *E.g., Committee for Equal Treatment, supra*, at para. 49; *Pezim, supra*, at para. 84.

53 Ontario, Royal Commission Inquiry into Civil Rights (1968), p. 229. The "constitutional principles" referred to by Chief Justice McRuer include the need to ensure that all powers conferred by the legislature are exercised in accordance with the law: see, *e.g.*, page 51 of his Report.

In 1997, the Nova Scotia Law Reform Commission made the following comment about the diversity of appeal practices in that province:[54]

> *Not only are there literally hundreds of different pieces of legislation with different wording as to the authority of the appellate body, but there are also a multitude of different informal and formal practices followed by these appeal tribunals. Consequently, if a member of the public, with or without a lawyer, embarks on one of these statutory appeals it is never precisely clear, unless he or she can become familiar with the actual practices of the administrative tribunal, as to the nature and scope of the appeal hearing itself, or the ultimate jurisdiction of the appeal body to deal with the first decision. There is also a significant variation in the procedural requirements and details of each agency.*

In a similar vein, the Leggatt Report in 2001 described the tribunal appeal system in England as follows:[55]

> *The current structure of appeal routes is haphazard, having developed alongside the unstructured growth of the tribunals themselves.*

One goal of this paper is to help provide a rational basis for design decisions so that terms such as "haphazard" and "inexplicable variation" will not apply to future appeal and other review structures in British Columbia.

Judicial Review

Characteristics

Judicial review is a tool used by the courts to review the legality of decisions by tribunals, inferior courts and a range of decisions by government.[56] It deals with legal errors relating to substantive matters as well as to procedural matters (e.g., a breach of natural justice). To use more technical language, judicial review is based on the inherent supervisory jurisdiction of the superior courts over inferior courts and certain other decision makers. In British Columbia, this supervisory jurisdiction is exercised by the Supreme Court of British Columbia. The substantive law on when

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54 Nova Scotia Law Reform Commission, *Agencies, Boards and Commissions: The Administrative Justice System in Nova Scotia*, Final Report (1997), online: http://www.chebucto.ns.ca/Law/LRC/admin2.html.

55 Sir Andrew Leggatt, *Tribunals for Users One System, One Service: A Report of the Review of Tribunals by Sir Andrew Leggatt* (2001), para. 6.8; online: http://www.tribunals-review.org.uk/leggatthtm/leg-00.htm.

56 For example, in the absence of a right of appeal, judicial review would be available in appropriate circumstances to address legal errors by a bureaucrat in revoking a licence or refusing to give a benefit such as social assistance.

judicial review can be obtained is primarily common law with a few alterations by the *Judicial Review Procedure Act*.[57]

The focus of judicial review is on the legality rather than the merits of the decision under review. The question is not whether the decision is correct on the merits but whether the decision maker committed a legally reviewable error in reaching the decision. Did the decision maker act outside his jurisdiction or otherwise commit an error of law?[58] In this sense, the scope and purpose of judicial review is different from appeal.[59]

Jurisdictional error can result from substantive errors such as wrongly interpreting a statutory provision. It can also result from procedural errors such as a failure to give notice prior to making a decision in those cases where notice is required by the rules of natural justice or procedural fairness.

The remedies available by judicial review, although statutory under the *J.R.P.A.*, are based on the common law remedies. From the perspective of reviewing a decision which has already been made, the most important remedy is relief in the nature of certiorari.[60] Certiorari was the prerogative writ used to quash or set aside a decision. The significance of this is that the reviewing court cannot substitute its decision for that of the decision under review. The court can only set aside the earlier decision, with the result that the original decision maker must make a decision a second time.[61]

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57 R.S.B.C. 1996, c. 241. In addition to a few alterations to the substantive law, the *Judicial Review Procedure Act* (*J.R.P.A.*) modified the common law procedures for seeking judicial review. It sets out the process which must be followed when making an application for judicial review.

58 Judicial review (by way of an order in the nature of certiorari) is available for intra-jurisdictional errors of law on the face of the record. Although judicial review does not focus on the merits of the original decision, decisions which are seriously wrong on the merits will be reviewable for legal error if the court concludes, for example, that the decision is patently unreasonable.

59 Despite this important difference in the purposes of judicial review and statutory appeals, the difference may not be that great between judicial review and an appeal to court (especially if the appeal is limited to questions of law). See the discussion above on the standard of review on appeals. There are, however, practical matters which may suggest that a statutory appeal to court is preferable to relying on judicial review; these are discussed below at page 40.

60 *Judicial Review Procedure Act*, s. 2(2)(a). As the result of section 7 of the *J.R.P.A.*, the court is now able to set aside a decision in those cases where the applicant is entitled to a declaration. A declaration merely declares rights; it does not have the legal effect of setting aside a decision. One of the benefits of the *Judicial Review Procedure Act* is that it eliminated many of the pitfalls caused by the technical rules governing the availability and scope of the prerogative writs (certiorari, mandamus and prohibition) and the private law remedies of declaration and injunction.

61 In those cases where the original decision was made by a panel of a tribunal, a different panel can make the second decision. Sections 5 and 6 of the *Judicial Review Procedure Act* address the ability of the court to give direction to the decision maker.

The rationale for judicial review was graphically explained by Southin J.A. in a recent decision of the Court of Appeal:[62]

> *It is the duty of the Queen's judges to ensure that all those upon whom, by enactment of the Legislature (Her Majesty by and with the advice and consent of the Legislative Assembly of the Province of British Columbia), powers of decision have been conferred, remain within the powers thus conferred. In other words, those persons (tribunals) upon whom powers have been conferred, must be prevented by orders in the nature of certiorari and prohibition from arrogating to themselves powers which were not conferred and required by orders in the nature of mandamus to exercise their powers as the Legislature intended.*
>
> ...
>
> *The Queen's judges did not have, before the enactment of the Judicial Review Procedure Act, and were not given by it, a roving commission to find fault with decisions within the scope of the powers conferred. A judge conducting a judicial review is not sitting in appeal. He or she is deciding whether the tribunal acted within its jurisdiction.*

As a general rule, judicial review is always available if the applicant can meet the requirements for obtaining a remedy. There are, however, two ways in which the availability of judicial review can be affected. If a statutory appeal exists from the decision under review, the reviewing court will normally exercise its discretion to deny a remedy on the basis that the applicant has not exhausted other available remedies (i.e., appeal). Conversely, if there is no statutory appeal, judicial review is normally be the only way of seeking a legal reversal of the decision.

The second way in which judicial review can be restricted is by a privative clause.

Privative Clauses

A privative clause is a legislative provision intended to limit the availability of judicial review. The privative clause in the *Workers' Compensation Act* is a lengthy example of this type of provision:[63]

> *The board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under this Part, and the action or decision of the board on them is final and conclusive and is not open to question or review in any court, and proceedings by or before the board must not be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise into any court, and an action must not be maintained or brought against a governor, officer, appeal commissioner or employee of the board in respect of an act, omission or decision done or made in the belief that it was within the jurisdiction of the board; and, without restricting the generality of the foregoing, the board has exclusive jurisdiction to inquire into, hear and determine….*

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62 Dissenting on another issue in *Taku River Tlingit First Nation v. Ringstad*, 2002 BCCA 59 at paras. 18 and 20.

63 *Workers' Compensation Act*, R.S.B.C., c. 492, s. 96 (1).

Most privative clauses are considerably shorter but there is much variation in content.[64]

The existence of a privative clause is a factor that a court takes into account when deciding how much (if any) deference it should give the tribunal under review.[65] This standard of review issue is discussed above in the context of appeals.[66]

Role of the Ombudsman

The mandate of the ombudsman includes reviewing a broad range of decisions.[67] The office of the ombudsman performs an important role with respect to both individual decisions and systemic issues; however, he does not have the power to reverse or change a decision. His remedial powers are solely to report and recommend. For this reason, the ombudsman is not dealt with as one of the mechanisms for correcting an original decision.[68]

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64 Privative clauses can contain one or more of the following: (i) a finality clause, (ii) a no *certiorari* clause and (iii) an exclusive jurisdiction clause; *cf.*, Jones and de Villars, *Principles of Administrative Law* (3rd ed.) (Carswell, 1999), pp. 694-695. For recent comments by the Supreme Court of Canada on the content of privative clauses, see, for example, *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 at para. 17; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 30; *Ivanhoe Inc. v. United Food and Commercial Workers, Local 500*, 2001 SCC 47 at para. 24; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at paras. 24 and 27; and *Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union, Local 454*. [1998]1 S.C.R. 1079 at para. 59.

65 See below for a discussion of using a privative clause when the review scheme is either appeal (page 68) or relying solely on judicial review (page 73).

66 For a full discussion of the effect of privative clauses on judicial review, see the Administrative Justice Project's Background Paper *Standard of Review on Judicial Review or Appeal* by Frank A.V. Falzon, released in December 2001. This paper is available at: http://www.gov.bc.ca/ajp/rpts/.

67 In those cases where a complainant has a right of appeal from the decision in question, the ombudsman does not have jurisdiction to investigate the complaint until after the appeal has been resolved or until the time limit for launching the appeal has passed: *Ombudsman Act*, R.S.B.C. 1996, c. 340, s. 11(1)(a).

68 Similarly, the Australian Administrative Review Council did not address the role of the ombudsman in its report *Better Decisions, supra*, p. 9, footnote 28.

3 DESIGNING A REVIEW STRUCTURE: A FIVE STEP PROCESS

A significant range of variables must be understood and taken into account if one is to make informed decisions in designing a review process. These variable factors include policy goals, legal matters, practical issues and the program environment within which the process will exist.[69]

The following five step process may assist in selecting an appropriate review structure:

Step 1: Identify the policy goals for the proposed review structure.

Step 2: Identify those individual characteristics of the system under review which are relevant to the review structure.

Step 3: Take into account three general principles: achieve legislative clarity wherever possible, avoid unnecessary diversity and seek proportionality among different review mechanisms.

Step 4: Make the macro-structural choice of process between internal review, appeal or reliance solely on judicial review (or a combination of internal review and appeal).

Step 5: Make micro-structural decisions on technical matters relevant to the broad type of review selected in step 3.

From one perspective, these steps are somewhat arbitrary and suggest a more linear process than what is in fact required. Although it is useful to begin the process by deciding what one hopes to achieve (step one), it is possible that the policy goals of the process may need to be revisited after consideration of the program environment within which the review structure will operate (step two). Nonetheless, the advantage of a clearly delineated process is that it helps ensure that critical matters are not overlooked but instead dealt with in an appropriate way.

The five steps fall into two broad groups. The first three deal with policy factors. In contrast, steps four and five address the choices or options available in designing a review structure.

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[69] A similar point has been made earlier by Terence G. Ison ("'Administrative Justice': Is It Such a Good Idea", in *Administrative Justice in the 21st Century* ed. by Harris and Partington (Oxford, 1999) 20 at p. 35):

> "The existence and nature of any structure for review or appeal can only be decided intelligently in a study of a particular subject area, including empirical research, looking at the goals of the system, and analyzing the best ways of achieving those goals.

The design process requires an assessment of a broad range of matters. Few people have the in-depth knowledge and experience to assess properly the complete range of policy, program area, legal and practical matters which need to be taken into account. For this reason, the design process should usually be undertaken by a small team of individuals each of whom brings his or her own perspective and expertise to the design process.

Before turning to the individual steps, a few general comments on steps one and two will help set the stage. A wide variety of policy factors are relevant in identifying an appropriate appeal or review structure. These factors fall into two groups. First are those factors which can be described as policy goals for any review regime (step one). The second group consists of other factors which should be taken into account when designing a review structure (step two).

Some of the policy factors discussed below are more important than others; some compete with other factors. None can be viewed as absolute. They are probably best viewed as a matrix of factors, all of which should be taken into account but whose individual importance may vary from program area to program area.[70] Although the focus is on program specific review structures, the option of a consolidated appeal tribunal is also addressed.

For the most part, this policy discussion is premised on the assumption that some form of statutory appeal or review mechanism is appropriate in a particular case. A decision, however, to rely solely on judicial review will in some situations raise many of these policy issues.

4 POLICY GOALS: STEP ONE

The first step is to decide where one wants to go. Only then can one make an informed decision about how to get there. At the risk of stating the obvious, intelligent design choices can be made only if decisions have first been made about the objectives of the proposed review scheme.[71]

There are a number of policy goals for any regime of reviewing original decisions:

- Fair and just decisions
- Consistency
- Timeliness
- Finality
- Accessibility

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[70] *Cf.* Ison, *ibid.* pp. 33-37.

[71] *Cf.* the discussion in *Better Decisions, supra*, p. 9.

- Cost efficiency

None of these goals is absolute. In some cases, particular goals must be weighed against other goals. All need to be taken into account when making a decision about appropriate appeal and review structures (and procedures) for a particular program area. A decision must, however, be made about their relative priority within a program area.

Fair and just decisions

The single most important goal is to maximize the opportunity for obtaining fair and just decisions.[72] It is the underlying reason for appeals in the judicial system and why most administrative appellate bodies have been created. Reaching a fair and just decision is obviously important to the individual in the case but there is also a larger public interest in the due administration of justice in the operation of government programs.

There are two aspects to reaching fair and just decisions. First, for lack of a better word, one wants substantively "good" decisions. This means that they are legally and factually correct and (where appropriate) informed by an understanding of the relevant policy factors. The Australian Administrative Review Council describes this goal as reaching the "correct and preferable decision".[73]

The second aspect of a fair and just decision is that the process leading to the decision be fair. The decision maker should comply with the applicable rules of natural justice or procedural fairness. Although the specific content of these rules depends on the circumstances of the case, the fundamental procedural rule is that the decision maker must listen to the party affected by the decision.[74] In practice, this usually includes, as a bare minimum, the right to know the case against you and an opportunity to be heard. Apart from procedural matters, natural justice also addresses the issue of bias.[75]

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72 Although of critical importance, it must sometimes be balanced against other goals, in particular the need to achieve finality in a timely way. See the discussion of competing goals below at page 27.

73 *Better Decisions, supra*, paras. 2.5 and 2.9-2.11.

74 *Audi alteram partem*, literally "listen to the other side".

75 *Nemo judex in sua causa*, literally "no one should be judge in his own case".

Consistency

Consistency is a significant factor in the quality of a final decision:[76]

> *It is a basic principle of the administration of justice that like cases should be decided alike.*

The result for the courts is the doctrine of *stare decisis*: a court is bound by earlier decisions of the same or higher courts. This is the doctrine of precedent. For the most part, administrative tribunals are not bound by precedent in the way that courts are. Since tribunals are expected to exercise their discretion in each individual case, a tribunal is unlikely ever to echo the following comment by a senior English judge:[77]

> *I am unable to adduce any reason to show that the decision which I am about to pronounce is right...But I am bound by authority which, of course, it is my duty to follow.*

Consistency nonetheless remains a factor in fairness. If two cases identical in all significant respects are decided in different ways, there will (at least in one sense) be a failure of justice. The law will have treated two people in an unequal fashion.[78]

Issues of consistency can arise in two contexts. The most obvious is where a single decision maker reaches inconsistent decisions. For the purposes of designing an appeal structure, however, the more significant situation is where the decisions under appeal are made by a number of different decision makers.[79]

Timeliness and finality

Timeliness and finality are two closely related goals. Any justice system should obtain finality in as timely a fashion as possible. This point is recognized in the Rules of the British Columbia Supreme Court:[80]

> *The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.*

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76 Rupert Cross, *Precedent in English Law* (3rd) (Oxford, 1977). p. 4.

77 *Olympia Oil & Cake Co. Ltd. v. Produce Brokers Ltd.*, (1915) 112 L.T. 744 at p. 750, quoted in Cross, *supra*, at p. 37.

78 *Cf.* Nova Scotia Law Reform Commission, *Agencies, Boards and Commissions: The Administrative Justice System in Nova Scotia* (Final Report) at pp. 4-5 of the online version of the section entitled "The Administrative Justice System in Nova Scotia": http://www.lawreform.ns.ca/systemABC2.html; and *Better Decisions, supra*, paras. 2.11 and 3.153.

79 This matter is explored more fully below, see at page 43 and footnote 222.

80 Rule 1(5).

Delay causes inconvenience, expense and frustration. To use a well worn maxim, "Justice delayed is justice denied."

The importance of finality was recently referred to by the Supreme Court of Canada in the context of court litigation:[81]

> *The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry.*

Although the courts place less emphasis on the need for finality in the administrative tribunal context than in litigation, it is still important.[82]

When addressing timeliness, two perspectives should be kept in mind. First is the timeliness with which a case is handled within the review structure; this includes time in the court system when there is a statutory appeal to court. The second perspective requires consideration of the speed with which finality would be reached if no statutory review structure existed. In that situation, a certain number of cases would proceed to court on judicial review, with the possibility of appeals from the initial court decision to the Court of Appeal and in some cases to the Supreme Court of Canada.

There are a number of reasons for delay that can occur in an administrative review scheme. These possible sources of delay are all factors which should be considered when designing a structure for reviewing decisions. At the macro-structural level, there is the obvious point that multiple layers of review take longer than a single layer, if all other factors are equal. At the micro-structural level, there are a number of technical matters which will either promote or minimize delay. For example, a statutory scheme may contain procedural rules which build in steps each of which may create delay. On the other hand, a statutory regime may contain time limits within which, for example, a case must be heard by the tribunal. A sometimes important source of delay is a high volume of cases, which can result in backlogs. A tribunal's ability to deal with a large number of cases in a timely fashion is affected, in part, by the human and financial resources available to it.

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81 *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 18.

82 In *Chandler, supra*, the Supreme Court of Canada noted that "...there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals" (para. 20) but then said that there should be more flexibility for certain tribunals to reconsider their decisions than is appropriate for courts (paras. 21 and 22). See the discussion of reconsideration above at page 10.

A further factor which can affect the speed with which a case is resolved is the case management system within the tribunal itself. A number of appellate tribunals periodically revisit their case management systems in order to expedite the way in which cases are handled.

In those cases where settlement is appropriate, early resolution of a dispute obviously reduces any delay in achieving finality.[83]

Yet another factor which can affect the speed with which finality is reached by an appellate tribunal is the nature and quality of the decision under appeal. An appeal focused on one or two discrete points of law can be heard and decided more quickly than a case which requires a *de novo* hearing.

This brief discussion of matters which can affect the timeliness with which a review process operates will be revisited below in the discussion of specific review options.

Accessibility

Accessibility is another goal for consideration. A good justice system will be as accessible as possible to the people using it. This point lies behind one of the guiding principles of the Administrative Justice Project: to foster "accessible programs that are easy to use and understand."[84] A review structure is of little use if individuals do not have access to it.

Accessibility has several facets. Although their importance may differ from program area to program area, the following characteristics are relevant to whether a review structure is accessible to its users:

- Affordable

  Cost or affordability from the individual user's perspective can be a factor affecting accessibility. Expenses to an individual include out of pocket expenses, time lost from work and possibly legal fees.

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83 See the discussion below at page 70.

84 Terms of Reference of the Administrative Justice Project, p. 2, available at <http://www.ag.gov.bc.ca/media_releases/2001/july2001/admin_justice_release.htm> and at the Project's website: < http://www.gov.bc.ca/ajp/terms/ >. This point is also emphasized in one of the objectives of the Project summarized in the Executive Summary to the Terms of Reference: to ensure that "administrative processes are open and transparent."

- Understandable

  An accessible review structure requires that concerned individuals be able to obtain understandable information about both its existence and how it works. This can be hindered by overly technical legislation and regulations, language barriers, and social or cultural factors.

- Usable without a lawyer

  A related issue is the ease with which a person without a lawyer can understand and use a particular review system. This point has been noted in reform proposals in both the United Kingdom and Australia.[85] Lawyers appropriately play a role with many types of tribunals; however, many tribunal users do not have legal representation. For them, a user friendly scheme is important.

- Geographically accessible

  Geographical accessibility can be another factor. Where possible, it is presumably preferable that a person appealing a government decision not have to travel long distances from his or her home. The importance of this factor depends, in part, on the financial and other resources of a typical user in a particular program area. It is also affected by the availability of technological alternatives such as video conferencing and electronic filing.

Cost efficiency

A further policy goal is reaching finality as inexpensively as can be done appropriately. Any review structure must fit within the available resources and utilize those resources as effectively as possible. In measuring cost efficiency, obvious costs such as staff time in the line ministry, remuneration for tribunal members and (in some cases) office overhead must be considered. But there are also other costs which are not immediately obvious but are nonetheless real, such as the cost to government[86] and the court system of dealing with judicial reviews.

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85 One of the goals in the Leggatt Report in England is to design a tribunal system which minimizes the need for persons to use lawyers as far as possible: *Tribunals for Users One System, supra*, paras. 1.11, and 4.15-4.22. See also *Better Decisions, supra*, para. 5.56.

86 Judicial reviews (like all other litigation) incur government lawyer time as well as staff time in the relevant line ministry.

Competing Goals

As noted earlier, these goals frequently compete with each other. Perhaps the most obvious example is the tension between reaching an ultimate decision which is fair and just, and reaching a final decision in a timely fashion. This tension is recognized by the courts, which have developed rules for resolving the conflict that sometimes results from these two goals.[87] As discussed below, the tension between finality and reaching a fair and just decision underlies a number of design choices: for example, on multiple levels of review, time limits and reconsideration.

The first step in the design process is to make at least an initial determination of the relative weight or priority that will be given to each of these over-arching goals. It may be necessary to revisit this determination after considering in detail the relevant characteristics of the program area under review.

5 PROGRAM CHARACTERISTICS: STEP TWO

The second step in the design process is to identify key characteristics of the environment within which the review structure will operate. This is true even when considering the option of a

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87 For example, the following three rules reflect the courts' balancing of these two goals. First, the doctrine of *res judicata* prevents a person from relitigating a matter resolved against him in a previous court proceeding to which he was a party. Secondly, especially in civil (i.e. non-criminal) appeals, the courts allow a party to introduce new evidence only in limited circumstances. Thirdly, once a court order has been entered, it is not possible to obtain a reconsideration of the matter except in very rare circumstances. These rules all help achieve finality. For a discussion of the policy issues relevant to the law on reopening a court decision, see J. Bruce McKinnon, "Setting Aside or Varying a Chambers Order: The Foreclosure Experience", (1987) 21 *University of British Columbia Law Review* 29 at 52-60.
The courts have also recognized that the goal of fairness must, on certain occasions, be subject to other considerations. In *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3, the Supreme Court of Canada ruled that the doctrine of necessity justified leaving in place criminal law decisions made by judges who the court ruled were not sufficiently independent from government (para. 7):

> "While the Charter has done much to improve the fairness of the administration of criminal law, it cannot guarantee complete fairness in all matters at all costs. Like res judicata, the doctrine of necessity recognizes the importance of finality and continuity in the administration of justice and sanctions a limited degree of unfairness toward the individual accused. Given this adverse effect, it should be applied rarely, and with great circumspection.
> As this rule applies to the situation at hand, absent a demonstration of positive and substantial injustice in the circumstances of a particular case, the doctrine of necessity will prevent the reopening of past decisions of the Provincial Courts of Alberta, Manitoba and Prince Edward Island by reason only of their lack of independence as found by this Court in our judgment of September 18, 1997."

consolidated appeal tribunal.[88] Although perhaps overstated, there is merit in the following comment:[89]

> *To adopt some general prescription, other than in the context of a subject-area study, would be to seek law reform through the methodologies of a bull in a china shop.*

In a similar vein, Professor John Willis has written:[90]

> *The question of who, if anyone, should have the right to overturn the decisions of what authorities on what issues is one that in my view can only be answered under all the circumstances of each particular case. The principle of "uniqueness" is the principle for me.*

Even if one does not subscribe entirely to these views, program characteristics are unarguably something which must be taken into account.

The following is a non-exhaustive list of characteristics that should be considered:

- Significance of the decision under review

  The impact of the decision under review is a critical factor and must be assessed from the perspective of both the individual and government. Relevant factors include:
  - amount of money at stake ($500 or $500,000)
  - effect of the decision on an individual (for example, does it affect a person's liberty or ability to earn an income at her chosen job?)
  - impact on public policy
    - If decisions have a significant impact on public policy, this factor may affect both who should be the ultimate decision maker and what process should be used for reaching that decision.
  - nature and quality of the decision under review
    - This factor is important. Was the original decision "quick and dirty" or was it reached after a lengthy and carefully considered hearing? For example, it could have an impact on a decision whether to create a statutory appeal or to rely on

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88 A proper assessment of the feasibility of a consolidated tribunal can be reached only after taking account the characteristics of the program areas which would be covered by the consolidated tribunal.

89 Ison, *supra*, p. 34. See also Tom Brennan, "The Hidden Dimensions of Administrative Law: First Tier and Internal Review – II", (1989) 58 *Canberra Bulletin of Public Administration* 141.

90 John Willis, "The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968) 18 *University of Toronto Law Journal* 351 at p. 359.

judicial review. Similarly, if a statutory appeal is created, this factor will likely influence the choice of procedure and grounds of appeal for the appellate body.

- The users

If a review structure is to be accessible and easy to use and understand, it must take into account the individuals who will use it: their level of education, sophistication and access to information and advocacy help. For example, individuals challenging an income assistance decision, a decision of the Labour Relations Board or a decision of the Securities Commission are likely to have different levels of sophistication in dealing with legal processes and different degrees of access to legal representation.

A closely related matter is power imbalances that may exist between parties. As an example, a significant power imbalance exists between government and a person seeking social assistance. On the other hand, a considerably smaller power imbalance exists between government and a business applying for a licence. Power imbalances can also occur in adjudication processes involving disputes between private parties.[91] The goal of reaching fair and just decisions is enhanced if characteristics of the users (including any power imbalances) are taken into account in designing a review mechanism. For example, in the case of a review scheme with multiple layers, one consequence of a power imbalance between private parties is that the party with fewer resources is less likely to continue through the process and may lose by default.

One consequence of a review structure is that the person affected by an adverse decision is more likely to feel that he has been heard and his views and needs considered. Although intangible, this is a not insignificant social or human factor. Its importance varies from program area to program area.

- Extent to which the issues are primarily legal or, conversely, the role of policy in reaching an appropriate decision

This factor is of particular importance in deciding whether a statutory appeal should be to the courts or to an administrative tribunal. For example, a tribunal is a better mechanism than a court for applying policy. The factor is also important, however, to the more fundamental question of the extent to which the final decision should be beyond the direct control of the government of the day. Is the dispute ultimately a public policy choice?

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[91] E.g., a dispute between a tenant and a large landlord.

The answer to this question may have an impact on who should make the final decision and how that decision is made.

- Whether there is a need for special expertise

  This factor is also of particular importance when choosing between a court or an administrative tribunal as the body to hear a statutory appeal. Judges have legal expertise; as a group, they do not have technical expertise in particular subject areas. The significance of this fact depends on the nature of the issues requiring adjudication in a particular program area.

- Whether it is desirable to limit the potential for political influence or interference

  Creating an external appeal minimizes the likelihood of political influence. In contrast, an appeal to cabinet leaves the final decision squarely in the political arena.

- Volume of cases

  Different design choices may be reached depending on whether, for example, there are 10, 500 or 10,000 original decisions for review in a year.

- Impact on the workload of the courts if there is no appeal to an administrative tribunal

  The possibility of individuals resorting to judicial review is a factor which must always be considered. England's court system recently experienced a severe problem from an enormous increase of judicial review applications from a high volume program area in which there was no appeal mechanism.[92]

- Culture or environment of the program area within which the tribunal operates

  To take one example, an appeal mechanism in a program area which has a history of litigation and involvement by lawyers may look different from a mechanism created for a program area where lawyers are rarely involved or where the working relationship between the government agency and a particular industry is generally non-adversarial.

- Available resources

  Review structures cost money and use staff resources. The availability of government resources is clearly a factor which must be taken into account.

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92 The problem arose in "homelessness" cases. See the discussion in the Law Commission's 1994 report, *Administrative Law: Judicial Review and Statutory Appeals* (Law Com No. 226) at pp. 10-15.

A knowledge and understanding of these program area characteristics is critical to making informed decisions about the macro-structural issues in step four (internal review, appeal or solely judicial review) and also the micro-structural decisions on technical matters in step five.

6 GENERAL PRINCIPLES IN CHOOSING OPTIONS: STEP THREE

Three general matters should be kept in mind when making the macro and micro-structural design choices in steps four and five. They are not immutable rules but rather general principles which should influence decisions made in the design process. From one perspective, these general principles can be viewed as goals applicable to the administrative justice system as a whole.

Process Certainty

As a general principle, legislative clarity is preferable to uncertainty about how a particular review scheme should operate. This point is recognized in the Terms of Reference for the Administrative Justice Project. One of the goals of the Administrative Justice Review component of the project is to ensure that:[93]

> *Legislation is based, to the greatest extent possible, on a principled, consistent and clear articulation of the role and powers of administrative agencies.*

Statutory clarity about a review structure increases ease of access for users of the review process. Conversely, lack of clarity reduces transparency of the process and can cause delay, financial expense and other difficulties:[94]

> *...it is too often the case that unnecessary confusion and litigation prevail regarding issues that can and should be addressed clearly in the agency's enabling statute....To the extent that confusion and litigation prevail in respect of basic issues concerning the operation of agency statutes, parties and the public experience unrecoverable financial costs, courts are burdened unnecessarily and administrative agencies can become frustrated in carrying out the tasks assigned to them.*

For this reason, legislation should wherever possible address and resolve issues which typically cause uncertainty.[95]

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93 Terms of Reference, *supra*, p. 10. The present paper forms part of the Administrative Justice Review.

94 Terms of Reference, *supra*, p. 10.

Diversity and Uniformity

Much of the focus in this paper is on tailoring a review structure so that it best fits the program environment in which it will operate. There is, however, also a legitimate interest in uniformity or at the very least in avoiding unnecessary diversity.

The reasons for diversity are obvious. Each review scheme grows out of a different program area, often with its own unique characteristics. There are differences, for example, of subject area, clientele, and legal and factual complexity of the issues under review. One reason for the creation of tribunals is that they will be less formal than the courts. The result is that a tribunal usually designs its processes and procedures so that they are as user friendly as possible for those accessing that particular system. The consequence is a tendency for procedural diversity to develop among tribunals in different subject areas.

Despite legitimate reasons for diversity, there is a reason to avoid it wherever possible. Diversity makes the administrative justice system less easy to access for those using it.[96] It is partly for this reason that the Australian Administrative Review Council refers to "coherence" as a goal in designing a system for reviewing original decisions: the system of review should be coherent when viewed as a whole.[97]

The following comment was made in 1957 by the Franks Committee in its report on the tribunal system in England:[98]

> *Perhaps the most striking feature of tribunals is their variety, not only of function but also of procedure and constitution. It is no doubt right that bodies established to adjudicate on particular classes of case should be specially designed to fulfill their particular functions and should therefore vary widely in character. But the wide variations in procedure and constitution which now exist are much more the result of ad hoc decisions, political circumstance and historical accident than of application of general and consistent principles.*

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95 Many of these issues will be discussed below, primarily in the context of appeal schemes; an obvious example is perhaps the extent to which an appeal tribunal should consider new evidence.

96 At a very practical level, one disadvantage of diversity is that it makes a particular tribunal process less accessible for a member of the legal profession who does not regularly appear before a particular tribunal. The effect of this can be increased legal cost for those persons making use of a lawyer before a particular tribunal.

97 *Better Decisions, supra*, pp. 10-11. This desire for coherence is one reason for the Council's recommendation for a unified Administrative Review Tribunal which would consolidate appeals from a number of existing tribunals into a single "super" review tribunal. The proposed new tribunal would subsume the role of the existing Australian Appeal Tribunal as well as a number of subject area specific tribunals.

98 *Report of the Committee on Administrative Tribunals and Enquiries*, (1957) HMSO, Cmnd 218, at para. 128.

This passage is equally true today for tribunals and, more generally, review structures in British Columbia.

As general principle, unnecessary diversity should be avoided.

Proportionality

Different review mechanisms should be proportionate to the gravity and complexity of the issues at stake. For example, a sophisticated and possibly costly process is more likely to be appropriate for decisions which raise complex issues and which have a major impact than for decisions where the issues are relatively straightforward and the impact is less significant.

Proportionality is important from the perspective of individual review schemes. It will likely occur if an appropriate assessment of the program area characteristics has taken place. But it is also important from the larger perspective of the administrative justice system as a whole.

Despite the significant diversity of program areas, the administrative justice system should be as coherent a system as possible. It is not simply a collection of unrelated adjudicative processes existing in isolation from each other. If the administrative justice system is to be a coherent whole, there should be proportionality among individual review mechanisms as well as avoidance of unnecessary diversity.

7 CHOICE OF REVIEW PROCESS: STEP FOUR

The first design choice is to decide whether to use internal review or appeal (or possibly a combination of the two) or whether to rely solely upon judicial review. As noted previously, judicial review is always in the background (subject to the rules governing when a remedy will be available). The threshold issue is therefore whether some form of statutory review should be available in addition to whatever relief may be available on judicial review. The answer to this macro-structural question requires an assessment of the pros and cons of internal review, appeal and reliance solely on judicial review.

Issues specific to the use of multiple layers of internal review and/or multiple layers of tribunal appeal are examined in a later section of the paper.[99] Although a decision to use multiple layers is a step four macro-structural choice, the issues unique to multiple layers are best understood after reviewing the matters relevant to the individual choices of internal review and appeal.

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[99] See "Multiple Levels of Review", beginning at page 73.

Before turning to the advantages and disadvantages of the different types of review, it is worth remembering two underlying themes of this paper. First, there is no single review mechanism that works best in all circumstances. Much depends on a range of factors, which vary from program area to program area. Secondly, in order to make a wise decision about an appropriate and workable review scheme, the designers must understand and take into account a broad range of practical and legal factors. They must understand the environment within which the program area operates (step two). They must also understand the legal and practical implications of many technical matters, which will to some extent determine whether the resulting review scheme will operate satisfactorily (step five).

It is of course also necessary to keep in mind the policy goals identified in step one:

- Fair and just decisions
- Consistency
- Timeliness
- Finality
- Accessibility
- Cost efficiency

Much as it would be desirable to set out clear guidelines about when internal review, appeal or reliance solely on judicial review should be chosen, the issue is more nuanced than that. In some respects, the situation is analogous to the problem faced by weather forecasters. A wide range of variable factors all affect the weather. Even a minor change in one of these factors can have a profound impact on the ultimate outcome. Thankfully, selecting an appropriate review scheme is not as difficult as weather forecasting but a change in one variable such as the volume of cases or whether lawyers are typically involved can have a significant impact on whether a particular review scheme will work in practice. For this reason, care must be used in setting out any general rules about when a particular process is the appropriate choice.

Internal Review

Introduction

The Ombudsman recently re-emphasized the role of an internal review process in those situations where a person has complained or objects to a particular decision:[100]

> *An internal complaint mechanism (ICM) gives agencies a second chance to provide quality service. It allows them the opportunity to correct errors before*

[100] Ombudsman, British Columbia, *Developing an Internal Complaint Mechanism* (Public Report No. 40, September 2001), p. 2.

> *external agencies, politicians or the media become involved. At the same time, data gleaned from complaints may highlight opportunities to improve policies, programs or service delivery.*

Internal review has also recently received attention in other parts of the common law world. In 2000, the Australian Administrative Review Council released a report entitled *Internal Review of Agency Decision Making*.[101] In addition the 2001 Leggatt Report makes reference to internal review.[102]

The Ombudsman's report recognizes that certain decision makers, in particular tribunals, have a limited ability to reconsider decisions in the absence of statutory authority to do so.[103] An important question explored in this section of the paper is when a power of internal review (including reconsideration) should be given by statute.

Policy Pros and Cons

As noted earlier, internal review includes reconsideration by the original decision maker and also a review on the merits by someone other than the person who made the original decision. Issues specific to reconsideration are addressed below as a separate topic. The following comments focus on internal review generally.

Internal review has a number of advantages:[104]

- It has the potential to be a quick and cost effective way of rectifying errors.
- In most cases, internal review is a more accessible process for users than the alternatives (appeal and judicial review).
- In many situations, internal review decisions are made by persons with a detailed understanding of the program area's operations. In contrast, appeal tribunal members typically may not have the same in depth knowledge of the issues and operations of the program area.

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101 Report No. 44.

102 *Supra*, para. 9.2ff.

103 *Supra*, p. 3.

104 For a more detailed discussion of the advantages and disadvantages of internal review, see Nigel Waters, "Internal Review and Alternate Dispute Resolution: The Hidden Face of Administrative Law – III" (1996) 79 *Canberra Bulletin of Public Administration* pp. 91-95; *Developing an Internal Complaint Mechanism, supra*; *Better Decisions, supra*, pp. 120-126; and *Internal Review of Agency Decision Making, supra*, pp. 2 and 23.

- In those cases where an error has not been made and the original decision will be left unchanged, an internal review process may result in the individual concerned nonetheless accepting the decision. This will occur more frequently where the internal review process provides an opportunity for direct contact between the reviewer and the individual complaining about the decision. Individuals will have felt that they have been heard and their concerns taken into account.[105]
- In those situations where an external appeal process also exists, internal review can reduce the number of cases that proceed to this more expensive process.[106]
- Separate from its role in a specific case, internal review can have a systemic benefit. As noted in the Ombudsman's recent report,[107] internal review can be a tool for improving the service provided by the ministry or agency; it can assist in quality control.[108]

On the other hand, internal review can have disadvantages in at least some circumstances:

- Where external appeal also exists, internal review may sometimes act as a barrier (even if only psychological) to those who would otherwise pursue an appeal to an outside body. (This matter is discussed at more length in the section below on multiple levels of review or appeal.[109])
- Unless the internal review is conducted by someone independent from the original decision maker, the individual may not feel that the matter has been reconsidered in an unbiased way.
- It has the potential to create inappropriate delay in achieving finality.
- If the decision maker is adjudicating between private parties, a right to apply for internal review can be a tool of abuse where there is an imbalance of financial resources between the parties.

In general, the strength of internal review relates to the goals of accessibility, timeliness and finality. In many cases, it can be a cost effective mechanism and can assist in achieving consistency. It helps achieve the goal of reaching an ultimately fair and just decision but will not

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105 This will be especially true in those situations where the original decision was made with no real input from the individual concerned.

106 The relationship of internal review with an external appeal process is considered more fully below under the discussion of multiple levels of review.

107 See passage quoted above at page 34.

108 *Better Decisions*, *supra*, para. 6.49.

109 See below at page 73.

always further this goal in the way that an appropriate appeal structure does. Two qualifications are important. First, as in most other aspects of the design process, the benefits of choosing of internal review depend to a considerable extent on the particular characteristics of a program area and on the micro-structural design choices addressed in step five.

Secondly, when assessing the appropriateness of internal review, it is helpful to distinguish between three different situations where internal review may be used.

1. Internal review in the absence of any appeal

   In this situation, the obvious points are that internal review is better than no review on the merits but it is sometimes perceived as having less impartiality than an external appeal. The significance of these two points depends in part on the relative importance of the policy goals for the review scheme. If the goal of reaching fair and just decisions outweighs the other goals and if the choice is between internal review and appeal, then appeal may be the preferable option. But if achieving finality as quickly as possible and minimizing review costs are the critical goals, then internal review may be the more appropriate choice. This may be even more the case in those program areas where only a few decisions per year would be subject to the review scheme.

2. Internal review and appeal both exist

   In this scenario, there are two levels of review: internal and external. There can be good reasons for first having a level of internal review even where an external appeal also exists. Despite the two layers of review, internal review can be a cost effective way to reach finality quickly in some cases. Much depends on the program area characteristics. Issues around multiple levels of review are dealt with in more detail as a separate topic later in this paper.[110]

3. Reconsideration by an appeal tribunal

   The issues relevant specifically to reconsideration (i.e., internal review) by an appeal tribunal are dealt with below in the discussion of appeals.

In summary, internal review can be a useful way of reviewing an original decision, either by itself or in conjunction with a subsequent appeal. Much depends, however, on the characteristics of the program area and, of course, on the way in which the internal review is conducted.

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[110] Page 73.

Appeal

Introduction

Appeal is probably the most important of the three general options for reviewing an original decision. "Appeal" is used here in the sense of an external appeal.[111]

When is appeal an appropriate choice for reviewing a particular type of decision?

Policy Pros and Cons

The primary argument for appeal is that errors are made and that appeal provides an appropriate mechanism for review – by a person or entity separate from the organization which made the original decision.[112] When compared with the other two review options (internal review and judicial review), appeal is the only mechanism which reviews an original decision on the merits in a manner which is unbiased both in fact and in the perception of the public. Judicial review does not provide review on the merits. Internal review lacks the independence and impartiality of an appeal.[113] In most situations, appeal is the review process which maximizes the goal of reaching fair and just decisions. Like internal review, it also helps achieve consistency.

Despite the benefits of appeal, it has the disadvantage of postponing the date when finality will be obtained. In addition, appeals cost money and time: both to the parties and to government in its role as provider of the appeal structure. However, to the extent that appeal to a tribunal has the practical effect of eliminating judicial reviews, it can help achieve the goals of timeliness and accessibility. Its cost effectiveness usually depends on particular characteristics of the program area.

In deciding whether appeal is an appropriate review option in a particular case, the disadvantages of appeal must be weighed against the benefit of an appeal to an external body. As noted

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111 As noted earlier, "appeal" is sometimes used to describe what is probably best seen as an internal review process.

112 For a fuller discussion of this point, see "Policy Reasons for Reviewing Decisions", above at p. 4. The Franks Committee, *supra*, made the following comment at para. 104: "The existence of a right of appeal is salutary and makes for right adjudication."

113 Even in those cases where internal review is conducted by officials geographically and organizationally separate from the original decision maker, there will still likely be a perception that they are not independent and impartial. See the discussion of this point in *Better Decsions*, *supra*, pp. 122 and 124.

previously, this assessment should take into account the relative importance of the policy goals for the review structure and also the characteristics of the particular program area.[114]

Judicial Review Alone

In what circumstances is it appropriate to rely on judicial review as the sole tool for reviewing a government or agency decision? Judicial review is, in appropriate circumstances, available to review both internal review decisions and decisions made by appeal tribunals. The issue addressed in this section of the paper is when it is appropriate not to create a statutory review scheme but to rely solely on the default option of judicial review.

Judicial review differs from internal review and appeal in that it does not provide review on the merits. As noted earlier, the purpose of judicial review is to test the legality of the decision under review.[115] It is not a vehicle for correcting errors of fact or discretion (as long as those errors are not so extreme that they constitute errors of law). As long as the decision is substantively and procedurally lawful, the court will not interfere.

Reliance solely on judicial review should occur only when it is appropriate that there be no broad based review of the decision on the merits. A classic example is decisions of the Labour Relations Board.[116]

In those situations where court review for errors of law is the appropriate basis of review in a particular program area, a decision must be made whether to rely on judicial review or create a right of appeal to court for errors of law. Similar to other design questions, a variety of factors should be considered. As noted above, the standard of review used by the courts is usually lower where a right of appeal exists than where the court hears a judicial review application.[117] Two program area characteristics of interest are the quality of the original decision making process and whether lawyers are typically involved in the process. Reliance on judicial review is more likely to be appropriate where the original decision is made after a full and fair hearing. In addition, a statutory right of appeal to court creates a more transparent and accessible process for members of the public than does judicial review. As a result, a user is less likely to require a

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114 Ison, *supra*, p. 35, gives examples of how certain program characteristics may affect the decision whether appeal is an appropriate choice in a particular situation.

115 See above at page 16.

116 In addition, labour relations boards typically have a strong privative clause limiting the circumstances when judicial review is be available.

117 See above, p. 15.

lawyer on a statutory appeal to court than on a judicial review.[118] In situations where it is in the public interest to ensure that the review mechanism is as accessible as possible, a statutory appeal to court on points of law is preferable to judicial review.[119]

There is another matter to be considered: the courts' workload. In the absence of a statutory appeal from the decision of the tribunal, a dissatisfied party will consider the possibility of seeking judicial review in the courts. Historically, an appeal to an appellate administrative tribunal has been created more than once in order to reduce the number of judicial reviews. For example, a 1994 English report addressed extreme delays which were resulting from an enormous increase in the number of judicial review applications.[120] Part of the reason for the increase was a large number of applications dealing with "homelessness" determinations by local government authorities, from which there was no form of internal review or appeal.[121] As noted earlier, a factor which should always be borne in mind when designing a review structure is the impact on the workload of the courts if there is no appeal or other statutory review mechanism.

In summary, reliance solely on judicial review is the review mechanism weakest at achieving the goal of fair and just decisions. As a result it is less useful than internal review or appeal in achieving consistency. It is the least accessible of the three broad review processes. On the other hand, except for those cases where judicial review is undertaken, it is very good at achieving finality in a timely way: the original decision (right or wrong) is more likely to remain the final decision. The cost effectiveness of judicial review depends in part on the volume of cases. It can be relatively efficient where there are only a few cases per year from a program area but it becomes less cost efficient as the volume of cases increases.

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118 Most non-lawyers probably do not know about the existence of judicial review let alone understand the sometimes esoteric law governing judicial review applications. On this issue, see Leggatt, *Tribunals for Users One System*, *supra*, para. 1.13.

119 In a recent report, the Australian Administrative Review Council came down on the side of a statutory right of appeal; however, several of its reasons for doing so depended on legal and constitutional issues unique to Australia. See the Council's Report No. 41, *Appeals from the Administrative Appeals Tribunal to the Federal Court* (Canberra, 1977) at pp. 19-21; see also the discussion in *Better Decisions*, *supra*, at pp. 158-159.

120 United Kingdom, The Law Commission, *Administrative Law: Judicial Review and Statutory Appeals* (Law Com. No. 226) (London, HMSO, 1994) pp. 10-15.

121 The Commission recommended the creation of an internal review mechanism (para. 2.24) and a statutory right of appeal to an independent tribunal or to the local county court (paras. 2.25 and 2.26).

8 TECHNICAL MATTERS: STEP FIVE

Once the macro-structural choice has been made whether to use internal review or appeal or to rely solely on judicial review, it is necessary to address a number of important technical matters relevant to the chosen process option. These are the micro-structural decisions of step five in the design process. Decisions on the specific details of an internal review or appeal scheme can have a critical impact on the ultimate success of the review structure.

Internal Review

If internal review is chosen as a review mechanism, the following matters should be addressed.

Statutory or Non-statutory?

In those cases where internal review may be a useful mechanism, a decision must be made whether there should be a statutory provision expressly addressing the issue. Before making that decision, legal advice should be obtained on the extent of the decision maker's ability to revisit the decision either by way of the original decision maker or by someone else within the organization. This requires an assessment of the common law rules on reconsideration[122] as well as the legislative scheme within which the decision maker will operate.

If there is uncertainty about the legal power to conduct an internal review in circumstances where that would be desirable, the prudent course of action is to provide a statutory power to do so. In any event, statutory clarification of a power to reconsider makes the review process more open and accessible to those affected by the decision. This is especially true for non-lawyers, who will not be aware of the limited common law powers of reconsideration.

New Evidence

As with an appeal, internal review can be structured so that the review is based solely on the material available to the original decision maker or a more expansive approach can be adopted. There are advantages and disadvantages to both approaches.

An advantage of the latter situation is that the decision maker could take into account a relevant change of circumstances since the original decision as well as comments from the concerned individual. This would have particular importance in those cases where the original decision was

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[122] See discussion above, p. 9.

made on the basis of limited information and no direct input from the individual. An obvious disadvantage is that the internal review process will take more staff resources.

No firm rule can be laid down on whether the person conducting the internal review should focus solely on material in front of the original decision maker or should take into account additional evidence and comments from the concerned individual. In many situations, taking into account new material will make sense but much will depend on the primary purpose of the internal review process in a particular case. A final assessment of this issue requires a consideration of a range of matters, including what if any appeal structure is in place.

Reconsideration by Original Decision Maker

Of all the types of review on the merits, reconsideration by the original decision maker is the least satisfactory from the perspective of having an unbiased review of the case. Nonetheless there are situations where reconsideration by the original decision maker can make sense. The most obvious is probably where there has been a change of circumstances after the original decision was made. If the decision maker concludes that his original decision contains an important error, the quickest and least expensive way of remedying the situation is reconsideration. In these and other situations, however, the benefits of a power to reconsider must be weighed against the potential disadvantages referred to above.[123]

Issues specific to reconsideration by an appeal tribunal are dealt with below as part of the discussion on appeals.[124]

Other Design Issues

In those cases where a statutory power of internal review is created, a number of design options should be considered. First, should the internal review be available as of right or should it be a discretionary power with the applicant having to obtain leave or permission? A variety of factors affect this decision but in many cases a right to internal review is probably appropriate.[125] Should there be a time limit for an application for reconsideration or internal review? The need for finality may suggest that a time limit is beneficial. If the internal review is to be limited to reconsideration by the original decision maker, should there be restrictions on the right to obtain reconsideration? For example, should the applicant have to base a request for reconsideration on the existence of

123 E.g., delay and loss of finality.

124 See page 67.

125 For a discussion of this issue in the context of reconsideration by an appeal tribunal, see below at page 67.

new evidence? If the internal review is to be conducted by someone other than the original decision maker, how separate should the reviewer be from the original decision maker? The Australian Administrative Review Council has suggested that, in most cases, the review should be undertaken by someone at an organizational and possibly also physical distance from the original decision maker; in particular, it should not be undertaken by the immediate supervisor of the person.[126] On the other hand, there may be situations where internal review by someone higher in the immediate organizational hierarchy may be the most practical option. The choice may depend in part on the number of cases likely to be the subject of internal review and the degree of relevant expertise in possible reviewers outside the immediate area.[127] A related consideration is that, if internal review is undertaken at the regional level, there is a greater risk of variation and inconsistency than where it is undertaken centrally.[128]

An important question is the extent to which an internal review mechanism should be relatively summary in operation as opposed to being a highly formalized and structured process. The contrast is between a comparatively quick and informal process and a more complex process which takes on attributes of an appeal (albeit an inhouse appeal).[129] This issue underlies many of the specific design choices referred to in the previous paragraph. If a highly structured internal review process is created, several key advantages of internal review may be lost. The process may be no quicker or accessible than a formal appeal to an appeal tribunal.[130] Depending on the volume of cases, a highly structured internal review/appeal process may also not be any less expensive than using an appeal tribunal. On the other hand, any form of internal review typically ensures that review decisions are made by persons familiar with the program area's operations. No general rule can be laid down except to ensure that any benefits of a highly structured internal review process outweigh the adverse consequences of the highly structured nature of the process.

As a final comment, there are steps that original decision makers can take in appropriate circumstances to improve the likelihood of their making a fair and just decision -- one which will not require any review. Although not internal review of an existing decision, pre-decision

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126 *Better Decisions, supra*, paras. 6.61 and 6.62; *Internal Review, supra*, pp. 18-21.

127 In a program area with a high volume of cases, one option is to create a separate internal review unit.

128 See footnote 222 for a discussion of inconsistency in the context of an appeal tribunal which sits in panels.

129 As noted earlier, an internal review process conducted by someone other than the original decision maker can in some circumstances verge on being an appeal; see footnote 17.

130 See the discussion of the advantages of internal review above at page 35.

consultation can sometimes be used by original decision makers. For example, prior to making a formal determination, a decision maker can provide the concerned individual with an opportunity for additional input.[131] The appropriateness such a course of action depends on a variety of factors including the number of persons affected by the proposed decision, the volume of cases that must be decided within a particular timeframe, a need to avoid delay and the likelihood of obtaining useful input. Where this approach is adopted, care must be taken not to run afoul of the *functus officio*[132] rule against revisiting a decision which has already been made.

Appeal

When a decision is made to create an appeal, there are a significant number of subsidiary matters which must be addressed if the appeal scheme is to work as effectively as possible. Although these options are discussed as separate topics, it must be remembered that many of them are inter-related. For example, the choice of appellate entity will be affected to some degree by the choices made about the grounds of appeal and the standard of review.

The focus of this section is on issues unique to appeal tribunals. Attention is also paid, however, to certain issues that apply to all tribunals but that can have a significant impact on whether an appeal tribunal will operate successfully.

As noted above, there is enormous diversity in existing appeals. Commenting primarily on the situation in Alberta, Jones and de Villars have written:[133]

> *The creation of an appellate mechanism lies in the gift of the legislature, and considerably more attention ought to be devoted by the legislature to the desirability and format of an appeal in all cases delegating statutory powers.*
> ...
> *There does not appear to be any particular logic in whether the appeal lies from one public servant to another, to a standing board or tribunal, or to a minister or the cabinet; or from a minister to cabinet, or to a standing board or tribunal.*

A range of detailed matters must be considered in a principled way if one is to create an appropriate appeal scheme.

Two points made earlier in the paper bear repeating. First, there is a need to take into account the individual characteristics of the program area in question. A non-exhaustive list of relevant

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131 See also footnote 16 above.

132 See the text at footnote 18.

133 David Phillip Jones and Anne S. de Villars, *Principles of Administrative Law* (3rd ed.) (Carswell, 1999) at pp. 529-530.

characteristics was set out above in the discussion of step two. To take just one example, the nature and quality of the decision under review (was it carefully considered or "quick and dirty"?) will likely have a significant impact on decisions about the grounds of appeal and the amount of new evidence that should be heard on the appeal.

Secondly, there are real advantages to be gained when legislation provides clarity about important details of the appeal scheme. For example, legislative clarity about the amount (if any) of new evidence to be heard on an appeal reduces time and resources spent wrangling over this question at the appeal hearing and possibly later on a judicial review from the appeal decision.

Choice of Appellate Entity: Tribunal, Court or Minister

The first decision is who will hear the appeal. The three primary choices are an appeal tribunal, a court[134] or the minister.[135] Appeals to cabinet have existed in the past but few now exist.[136]

The balance of this section will focus on tribunal and court appeals. The primary argument for a ministerial appeal is that it is the minister who is ultimately responsible for a program area. A further argument is that government should have the ability to ensure that decisions are consistent with government policy. (This argument is also relevant to the more general issue whether there should be external appeal from a particular type of original decision.[137]) There are, however, serious disadvantages to ministerial appeals. One of the most obvious is the workload of ministers; they usually do not have the time to personally consider an appeal in the way that an external appellate body would. This is especially true if there are a significant number of appeals in a year. Secondly, although a minister is responsible for the operations of his ministry, he often will not have the detailed expertise to make an independently informed decision. This may have been part of the reason for the transfer in 1981 from the minister to a Gas Safety Appeal Board of

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134 Typically either the British Columbia Supreme Court or the Court of Appeal.

135 Although ministerial appeals are not a true external appeal, the minister is sufficiently removed from the operational program area that they are best dealt with as an appeal rather than as a form of internal review.

136 See, for example, cabinet's ability to vary or rescind a decision of the Environmental Appeal Board where that is in the public interest: *Environment Management Act*, R.S.B.C. 1996, c. 118, s. 12. The primary rationale for an appeal to cabinet is where it is appropriate that particular types of decisions should reflect public policy as viewed by the elected government acting in the general public interest.

137 See the earlier discussion at page 29 on the policy impact of decisions as a factor to be considered in designing an appropriate review structure.

appeals from the chief inspector under the *Gas Safety Act*.[138] Another reason for avoiding ministerial appeals is the political controversy which historically has sometimes resulted from appeal decisions by ministers or cabinet.

Appeal Tribunals: Quasi-courts, an Arm of Government or Neither?

Before turning to the choice between an appeal tribunal and the courts, it is helpful to consider the nature or role of appeal tribunals in the Canadian legal system.[139] Under the constitutional framework which Canada inherited from Britain, we have three separate levels of government: the legislature, the executive and the judiciary.

There are several models for how one should view the role of appeal (and other adjudicatory) tribunals. One is set out in the recent Leggatt Report in England. It contemplates a tribunal structure which in many respects would parallel or complement the court system.[140] At the other end of the spectrum are Australian views about the role of a proposed new consolidated tribunal: the Administrative Review Tribunal. For example, the Australian Administrative Review Council stated in *Better Decisions*:[141]

> *...review tribunals are part of the Executive arm of the Australian Government and cannot exercise judicial power.*

One reason for this comment is that under the Australian constitution, federal judicial power can be exercised only by the federal courts. However, the Australian Attorney General made the following comment in the context of ministers' ability to issue directions to the proposed new review tribunal:[142]

> *Well the criticism of that I think fails to recognise that these are merits reviews of decisions made by the executive. The executive operates under government policy. Ministers and Cabinet made government policy, there is no reason why on a merits review, policy shouldn't be relevant to the review process as it is to*

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138 *Gas Safety Amendment Act, 1981*, Stats. B.C. 1981, c. 16. The appeals were formerly heard by the minister who could, if he thought fit, obtain assistance from an expert: *Gas Safety Act*, R.S.B.C. 1960, c. 161, s. 25. A similar change was made for electrical and elevator safety appeals.

139 Since this discussion addresses the role of appellate tribunals, the following comments will focus on the role of adjudicative tribunals rather than tribunals which also perform a significant non-adjudicative functions (e.g., regulatory).

140 For example the Report, *supra*, contemplates creation of a tribunal system so that "tribunals [will] acquire a collective standing to match that of the Court System..." ("Overview", para. 8). It suggests that senior members of the appellate tribunal be judges (para. 6. 37).

141 *Supra*, p. 13 of online "Preface".

142 Online transcript of "The Law Report" on Radio National: http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s195024.htm.

> *the original decision making. Ministerial directions to the tribunals will be able to reflect the relevant policy involved in the area of decision making.*

This view of the place of review tribunals is fundamentally different from the quasi-court model espoused in the Leggatt Report.

In Canada, adjudicative tribunals are expected to act as quasi-independent agencies dispensing justice in an impartial manner. This function is similar to that of the courts except that tribunals lack the independence and freedom from government influence enjoyed by the courts.

Courts and academic writers have addressed the role of tribunals in a variety of ways over the years. The Supreme Court of Canada pronounced on this question most recently in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*. Discussing the question of tribunal independence, Chief Justice McLachlin stated:[143]

> *...Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges -- both in fact and perception -- by insulating them from external influence, most notably the influence of the executive: Beauregard v. Canada, [1986] 2 S.C.R. 56, at p. 69; Régie, at para. 61.*
>
> *Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not.* [emphasis added]

For an adjudicative tribunal, the result is an ongoing tension between its need to decide cases in an impartial and quasi-judicial manner and its ultimate accountability to government. The hybrid nature of tribunals is a factor that should be kept in mind when assessing whether an appeal should be to a tribunal or to the courts.

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[143] 2001 SCC 52, paras. 23-24 *per* McLachlin, C.J., for the unanimous court.

Appeal Tribunal v. Courts

This section addresses factors relevant to deciding whether an appeal from an original decision should be to a tribunal or to a court.[144] In this province, an appeal to court would lie to either the British Columbia Supreme Court[145] or to the Court of Appeal.[146]

As a preliminary point, it is important to draw a distinction between appeals on fact and law and appeals solely on law. Where the appeal is not restricted to questions of law, it is possible to have a full review of the merits. As a general rule, there is a greater possibility that an appeal restricted to questions of law should lie to a court than where the appeal is on questions of fact and law. But a proper choice cannot be made without considering a range of factors.

Many of the reasons for using an appeal tribunal are the same as the more general reasons for the creation of administrative tribunals. The following is a typical list:[147]

- remove certain subject matters from the courts
- utilize decision makers with special expertise in the subject matter of the case
- resolve disputes more quickly and less expensively than in the courts
- create a more accessible and less formal process than in the courts
- create an adjudicative forum where policy can inform or influence the adjudicative decision
- particularly in program areas generating a large number of cases, prevent or reduce an expansion of the courts' workload.

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144 The issue whether there should be a subsequent appeal to court from the decision of an appeal tribunal is discussed later.

145 See Rule 49 of the *Rules of Court* for the procedure on appeal to the British Columbia Supreme Court; it is subject to specific provisions in the legislation creating the right of appeal.

146 Certain other jurisdictions have created specialized courts within the regular court structure or have designated selected administrative tribunals as superior courts of record. For a variety reasons, neither of these options is likely to occur in British Columbia.

147 For discussions of the reasons for creation of tribunals, see Craig, *supra*, p. 142; Law Reform Commission of Canada, Working Paper 25, *Independent Administrative Agencies*, *supra*, pp. 34-38; Macaulay and Sprague, *supra*, pp. 1-2 to 1-2.1 and 2-3 to 2-5; David J. Mullan, "Administrative Tribunals: Their Evolution in Canada from 1945 to 1984" in *Regulations, Crown Corporations and Administrative Tribunals*, ed. by Ivan Bernier and Andrée Lajoie (Toronto, 1985) 155 at 193-195; Margot D. Priest, "Fundamental Reforms to the Ontario Administrative Justice System" in Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies for Civil Justice Review*, vol. 2 (Toronto, 1996) 545 at 552-554.

In assessing whether an appeal should lie to a tribunal or to court, it is important to take into account the program characteristics identified in step two of the design process. For example, if the program area has a large number of cases, involves small sums of money and would benefit from decision makers with special expertise, these factors suggest using an appeal tribunal. If, however, the program area generates only a few potential appeals per year, involves large sums of money and the cases are likely to arrive in court on judicial review in any event, these factors may suggest having the appeal go directly to court.[148]

Although a firm rule cannot be laid down, there are some general principles. First, appeal to a tribunal is generally more accessible to lay persons,[149] less costly and faster than appeal to court. This is not, however, invariably the case. For a variety of reasons, delays in excess of typical court delays sometimes develop in tribunals. There are a variety of reasons why a tribunal appeal scheme may not meet the goal of being faster and less expensive than an appeal directly to court. For example, it can result from a backlog of cases delaying a hearing date or it can be the result of a tribunal taking a long time to release its decision after the hearing. On the other hand, delay in final resolution can also occur where a significant number of a tribunal's decisions go to court on judicial review. Where delay in achieving finality in an existing appeal scheme is the driving force behind change, a determination should of course be made whether the cause of the delay and lack of finality arises primarily from the structure of the statutory scheme or from resourcing or case management difficulties which can be remedied.

Secondly, if the appeal is to be a full review of the case on all its merits, this is a factor in favour of using an appeal tribunal. This is particularly the case where the appeal is best conducted *de novo*, where special expertise is required or where no deference should be given by the appellate body to the original decision maker.[150]

Thirdly, arguments in favour of a tribunal appeal are weakened when the appeal is limited to a question of law. Recommendations on review processes in England and Australia have typically said that there should be appeals to court on questions of law.[151] On the other hand, Canadian

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148 Although a right of appeal to the British Columbia Supreme Court may not formally exclude the possibility of judicial review of the original decision, parties will for a variety of reasons use the appeal mechanism.

149 The Leggatt Report placed considerable emphasis on the benefit of designing a review scheme that maximizes the ability of persons to use it without legal representation: see footnote 85 above.

150 The issue of deference and standard of review is addressed more fully below.

151 This has been in the sense that there should be an appeal to court (on questions of law) from the final level of decision at the tribunal level -- whether the tribunal made the original decision or heard an appeal from the original decision. See Franks Report, *supra*, paras. 105-107; Leggatt Report.

practice has been to give greater deference to tribunals and to leave many questions of law for determination by tribunals, subject only to judicial review.

Fourthly, in those cases where an appeal lies to court, there are a number of factors that should influence the decision whether the appeal should be to the British Columbia Supreme Court or to the Court of Appeal.[152] The advantage of an appeal directly to the Court of Appeal is that finality is reached more quickly,[153] coupled with the benefit of three judicial minds rather than a single Supreme Court judge.[154] A disadvantage is that a Court of Appeal hearing uses more judicial resources than a hearing in Supreme Court. Except where the original decision is made by a tribunal with significant expertise in regulating a complex area, an appeal directly to the Court of Appeal is unlikely to be justified. The appeal should usually lie to the Supreme Court of British Columbia. As with all other design options, however, it is important to take into account the complete range of relevant factors so that one achieves a scheme which will, in practice, produce a fair and just decision in a timely and cost efficient way.

Apart from the policy goals and general principles outlined above, it is not possible to identify rigid rules about when there should be an appeal to an administrative tribunal as opposed to court. An informed decision on this issue requires an understanding of the policy goals set out above as well as an understanding of the particular program area (and the culture within which it operates) coupled with an understanding of the practical consequences from a legal and procedural perspective.

Single Level of Appeal to Court?

As noted earlier in this paper, if an appeal is created from a government (or tribunal decision) to court, a choice must be made whether to restrict the right of any further appeals. This issue arises where the initial level of court appeal is to the British Columbia Supreme Court. (Once the matter has reached the Court of Appeal and that Court has rendered a final decision, federal law creates a right to seek leave from the Supreme Court of Canada for appeal to that court.)

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supra, para. 6.12; and Australian Administrative Review Council, *Appeals from the Administrative Appeals Tribunal to the Federal Court, supra*, para. 2.7.

152 See Appendix A for a list of tribunal appeals to the British Columbia Supreme Court and to the Court of Appeal. This table does not include any appeals which may exist directly from a government decision maker.

153 If the appeal is initially to the British Columbia Supreme Court, there is a right of subsequent appeal to the Court of Appeal (unless that right is removed by statute).

154 The Court of Appeal sits in panels of three judges (with some exceptions).

There are three basic options:

1. leave the existing right of appeal to the Court of Appeal untouched;
2. allow appeal to the Court of Appeal but only with leave of that court,[155] or
3. remove the normal right of appeal to the Court of Appeal from a decision of the British Columbia Supreme Court.[156]

The third option means that the decision of the British Columbia Supreme Court becomes the truly final decision. The choice between these three options depends primarily on the relative importance of achieving finality as quickly as possible.

Consolidated Appeal Tribunal(s)

This paper has focussed on the design of appeal structures for individual program areas. Although a large scale consolidated appeal tribunal appears unlikely in the near future, a few comments are nonetheless warranted.

First, whenever a new appeal tribunal is contemplated, consideration should be given to whether its functions should be consolidated with those of an existing appeal tribunal. This decision will require consideration of a range of program area characteristics in addition to assessing subject matter similarities between the existing and proposed tribunals and identifying critical policy concerns that would make consolidation in appropriate.

Secondly, a number of models exist for consolidated appeal tribunals covering a range of subject areas. One is to create a consolidated tribunal which hears many but not all tribunal appeals. This is the model on which the existing Administrative Appeals Tribunal in Australia is based. A more comprehensive approach is reflected in the proposed Administrative Review Tribunal in Australia, which would assume the jurisdiction of the existing Administrative Appeals Tribunal and other individual tribunals.[157] This latter model also lies behind the Appellate Division of the tribunal scheme proposed in the Leggatt Report in England. A further variation is for the consolidated tribunal to exercise both original and appellate jurisdiction, as would the proposed Australian Administrative Review Tribunal and the tribunal system recommended in the Leggatt Report.[158]

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155 For an example, see footnote 30.

156 See the discussion above at footnote 30 of appeals from Small Claims Court.

157 See *Better Decisions, supra* and the *Administrative Review Tribunal Bill 2000*, passed by the Australian House of Representatives but rejected by the Senate in February 2001. A national election subsequently occurred in November 2001.

158 *Supra*.

The primary factors relevant to an assessment of a consolidated appeal tribunal include issues of expertise and specialization of the decision makers, procedural uniformity and cost effectiveness. A frequently expressed concern about a consolidated tribunal (whether at first instance or on appeal) is that there would be a loss of expertise – one of the reasons for the creation of tribunals in the first place. This concern can be addressed at least to some extent by having formal subject area divisions within the tribunal[159] or at the very least by requiring that tribunal members hearing certain types of cases have a particular background.[160]

If it is decided that the possibility of a consolidated appeal tribunal should be pursued, it would be helpful to obtain empirical information about the operation of these tribunals in those jurisdictions where they exist. In its 1997 report on administrative law reform, the Nova Scotia Law Reform Commission recommended that a cost/benefit analysis be undertaken before a decision was made about a possible consolidated appeal tribunal.[161] In addition, it would be prudent to consider the implications, if any, of section 96 of the *Constitution Act*.[162]

Grounds of Appeal

There are three choices.[163] In practice, the primary issue is whether a person should be able to appeal any alleged error by the original decision maker or whether the appeal should be limited to errors of law.

If an appeal is only on points of law, the appeal body will not have an opportunity to review findings of fact or an exercise of discretion; the only exception is where the original decision maker erred to such an extent that an error of law was committed in the fact finding or exercise of discretion.[164] An appeal on errors of law does, however, allow the appellate body to deal with

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159 This is the approach recommended in the Leggatt Report for the non-appellate jurisdiction of the tribunal system.

160 For example, within the (non-appellate) Social Affairs Division of the Administrative Tribunal of Québec, some categories of cases require a physician, others require a psychiatrist and social worker to be on the panel: *An Act Respecting Administrative Justice*, Stats. Que. 1996, c. 54, ss. 21 and 25.

161 Recommendation 16, Nova Scotia Law Reform Commission, *Agencies, Boards and Commissions, supra*. This recommendation also suggested that a cost benefit analysis be undertaken for both increasing and decreasing the number of appeals.

162 Section 96 deals with the power of the governor general (the federal government) to appoint superior court and certain other judges. The case law under this constitutional provision imposes limits on the ability of a legislature to give certain court like functions to an administrative tribunal.

163 Discussed above at p. 12.

164 Depending in part on the standard of review exercised by a tribunal or judge, unreasonable findings of fact or exercises of discretion may constitute errors of law and in some cases of jurisdiction.

breaches of natural justice or procedural fairness.[165] An appeal limited to errors of law will in theory reduce the number of appeals and will certainly limit the number of cases where the appellate body reverses or modifies the original decision.

When should the appeal body have the ability to second guess factual determinations made by the original decision maker?[166] This question is separate from the issue whether the appeal is on the record or the appellate body can base its decision on evidence not presented to the original decision maker. (It is also separate from whether the appeal hearing is oral or consists only of written submissions.) As with many other design decisions, it is impossible to lay down dogmatic rules. The answer depends on the relative importance of the different policy goals and an assessment of relevant characteristics of the program area. For example, if the original decision making process entailed only a cursory review of the facts with little scope for input from the concerned individual, this would be a factor supporting an appeal on both facts and law. On the other hand, if the original level decision involved a lengthy hearing with a careful review of all relevant facts and if the benefit of finality outweighs some of the other policy goals, then these factors would favour limiting an appeal to questions of law.

One very practical matter needs to be considered. Lawyers and courts sometimes have extreme difficulty drawing the line between questions of fact, questions of law and questions of mixed fact and law. For example, Mr. Justice Iacobbuci stated in *Southam*:[167]

> *I recognize...that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or vice versa.*

The Australian Administrative Review Council has commented:[168]

> *Determining whether a particular question is a question of law or a question of fact is not a simple task conceptually and difficulties often arise in practice.*

Parties without legal representatives are usually oblivious to the distinction. One result can be that a lay appellant tries to raise questions of fact on an appeal limited to questions of law. Hearing time is then spent explaining to the appellant why he cannot raise and argue factual

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165 There may be circumstances where it is appropriate for the sake of clarity to refer expressly to procedural error as well as error of law as a ground of appeal.

166 This discussion focuses on errors of fact which do not also constitute errors of law or jurisdiction.

167 *Supra*, para. 35. For a further example, see the discussion in *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 at paras. 36-42 whether a particular issue was best characterized as a question of fact, law or mixed fact and law.

168 *Appeal from the Administrative Appeal Tribunal to the Federal Court, supra*, para. 1.5.

errors that he may consider fundamental to his case. An argument can be made that efficiency and openness of an appeal process favour not limiting an appeal to questions of law in program areas where lawyers are not usually involved. This issue, however, is merely one of a range of legal and practical factors which should be taken into account when determining the grounds of appeal.

When should the appellate body have the ability to review an exercise of discretion by the original decision maker? This discussion is directed at exercises of discretion that are not so unreasonable that they constitute errors of law or jurisdiction.[169] As a preliminary point, discretionary powers are not uniform in nature. For example, it is less evident why an appeal body should have the ability to second guess a senior government decision maker's discretionary assessment of what is in the "public interest" in a particular program area[170] than it is in the case of a discretionary power to choose between several available remedies.

A key factor is the relative subject matter expertise of the original decision maker and the appellate body. This factor underlies the courts' willingness to give deference to an exercise of discretion even on an appeal to court (as distinct from judicial review). Even where the appeal lies to an appeal tribunal which hears a significant number of cases per year, consideration should be given to the extent to which the appeal tribunal should have the ability to second guess an exercise of discretion by an official working in the program area. On the other hand, it is worth noting that the Australian Administrative Review Council strongly advocates creating a system where the appeal tribunal has the ability to reach the "correct and preferable" decision.[171] This entails the ability to step into the shoes of the original decision maker in all respects.

As with other aspects of an appeal structure, a decision on the appellate review of discretion should take into account a variety of factors, bearing in mind the over-arching goals assessed in step one–in particular the goal of reaching a fair and just decision.

If the decision is that an appeal should be on questions of fact, law and discretion, the appeal is probably best created as a simple right of appeal with no reference to fact, law or discretion.[172]

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169 Where the exercise of discretion is so egregious that it constitutes an error of law, it is reviewable as an error of law.

170 See the earlier reference to the general manager under the *Liquor Control and Licensing Act*, footnote 33.

171 *Supra*, footnote 73.

172 *Cf. Saunders Farms Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, January 19, 1995, B.C.C.A., Van. Reg. No. CA017895 at paras. 41-43; and *Stafford v. Newfoundland Milk Marketing Board* (1987), 67 Nfld. & P.E.I.R. and 206 A.P.R. [illegible]8 (Nfld. S.C.T.D.).

As noted later, it is also helpful to clarify in the remedial powers that the appeal body can substitute its opinion for that of the original decision maker. If, however, the decision is to minimize the ability to appeal on discretionary issues, the appeal should be limited to questions of fact and law (or just law, if that is the choice).

Standard of Review

What, if any, deference should be given to the original decision maker? In the full merits review model supported by the Australian Administrative Review Council, no deference is given.[173] The purpose is to reach a decision that is both correct and preferable from a policy perspective (in those situations where there is more than one "correct" decision). In essence, a *de novo* appeal occurs. The appeal tribunal rehears the evidence (including possibly new evidence) and forms its own conclusions about the facts and law.

At a practical level, standard of review does not appear to loom as a serious issue when the appeal is to a tribunal. This is especially true where the appellate tribunal supplements the factual record created by the original decision maker with additional evidence received at the appeal hearing. Deference will not be given on questions of either fact or law.

Where, however, the appeal is to court, the standard of review is a question which must be considered. There are two reasons. First, the appeal will likely be on the record with no new evidence considered by the appeal court. Secondly, an appeal court – unlike an appeal tribunal -- may have less subject matter expertise than the original decision maker. Since the degree of judicial deference is at least in theory governed by the intention of the legislature,[174] the legislature can indicate what level of deference it wishes a court to give when hearing an appeal from a tribunal (or individual decision maker)[175]. One statutory factor that suggests a low level of deference is where the legislation allows the appellate court "to substitute its opinion for that of the tribunal."[176] In addition, there is the possibility of expressly mandating the standard of review

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173 *Better Decisions, supra.*

174 *E.g., Pushpanathan, supra*, para. 26 and 30; *Pezim, supra*, at para. 61. There is, however, no deference on questions of jurisdiction.

175 For an example of an existing appeal from an individual decision maker directly to the courts, see section 28 of the *Fire Services Act*, R.S.B.C. 1996, c. 144, which provide for appeals to court from certain decisions of the Fire Commissioner.

176 *Pezim, supra*, para. 63.

in legislation; this issue is explored in a separate background paper released by the Administrative Justice Project in 2001.[177]

Remedies

The practical effect of an appeal decision depends to a considerable extent on the remedial powers available to the appellate body. There is a range of choices for the powers to be given an appellate decision maker.

In the absence of special considerations, the single most important remedy is a power to reverse, confirm or vary the decision under appeal.[178] But there are other options that may be appropriate in particular situations:

- confirm or reverse (i.e., without a power to vary)
- remit back to the original decision maker
- substitute the appeal tribunal's opinion for that of the original decision maker
- the Court of Appeal model:[179]

  On an appeal, the court may
  (a) make or give any order that could have been made or given by the court or tribunal appealed from,
  (b) impose reasonable terms and conditions in an order, and
  (c) make or give any additional order that it considers just.

A power only to confirm or reverse may be appropriate where the only possible answer on appeal is yes or no. This would be the case where, for example, the original decision was simply whether or not a licence should be issued in a situation where there was no discretion about terms or conditions of the licence. In many cases, however, the original decision maker has a

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177 *Standard of Review on Judicial Review or Appeal* by Frank A.V. Falzon, available at: http://www.gov.bc.ca/aip/rpts/.

178 It may often, however, be appropriate to couple this power with a power to remit the matter back to the original decision maker. See the discussion below.

179 *Court of Appeal Act*, R.S.B.C. 1996, c. 77, s. 9(1). In addition to the powers in subsection 9(1), the Court of Appeal has the following powers in subsections 9(2), (3) and (8):
(2) The court or a justice draw inferences of fact.
(3) The court may exercise any original jurisdiction that may be necessary or incidental to the hearing and determination of an appeal.
(8) For all purposes of and incidental to the hearing and determination of any matter and the amendment, execution and enforcement of any order and for the purpose of every other authority expressly or impliedly given to the Court of Appeal.
(a) the Court of Appeal has the power, authority and jurisdiction vested in the Supreme Court, and
(b) if the appeal is not from the Supreme Court, the Court of Appeal has the power, authority and jurisdiction vested in the court or tribunal from which the appeal was brought.

wider choice than a simple yes or no. In these cases, an appellate power only to confirm or reverse will sometimes limit an appellate body's ability to reach the most appropriate decision.

A power to remit back should always be considered as an option. It will nearly always be used in conjunction with a power to confirm, reverse or vary. Only in rare circumstances would it be appropriate to have a power only to confirm or remit back.[180] A decision simply to remit the case back to the original decision maker for further enquiry or reconsideration will usually delay the date when finality is achieved. This remedy may nonetheless be the best route for obtaining an ultimately fair and just decision in certain cases. It is worth noting that appeal courts sometimes remit a matter back for retrial.[181] A power to remit back to the original decision maker is probably more likely to be appropriate where the appeal tribunal hears little or no new evidence.

As previously noted, an express power for the appellate body (especially a court) to substitute its opinion for that of the original decision maker may indicate that the legislature does not contemplate a significant amount of deference.[182] In many respects, the remedial power exercised by the Court of Appeal reflects an intention that it should reach what it feels is the appropriate decision.[183] In that sense, it is simply a more fulsome version of the typical appeal tribunal power to confirm, reverse or vary.

Mode of Appeal: How Much New Evidence?

What, if any, new evidence should the appeal body hear? The answer to this question is one of most important factors influencing what will happen at an appeal hearing. There are a variety of options from which to chose:

- no new evidence (appeal on the record or "pure" appeal)
- all new evidence (appeal *de novo* or trial *de novo*)

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180 One example is where it is necessary to discourage an appeal body from substituting its opinion or discretion for that of the original decision maker.

181 *E.g.*, the Supreme Court of Canada sent a case (or part of it) back for retrial in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 and in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12.

182 See *Saunders*, *supra*, at para. 32:

> "There is a profound difference between an appeal to a tribunal which has had conferred upon it the power of substituting, on a question which is not one of law alone, its own opinion for that of the original tribunal and an appeal to a tribunal which has not had such a power conferred upon it...."

183 This does not mean, however, that the Court of Appeal will readily second guess a factual determination by the lower court. For a discussion of the test used by appeal courts in reviewing findings of fact by a lower court, see the Administrative Justice Project's Background Paper *Standard of Review on Judicial Review or Appeal*, *supra*, at p. 9. This paper is available at: http://www.gov.bc.ca/ajp/rpts/.

- some new evidence
- expressly leave the choice to the appeal body to be decided on a case by case basis
- provide no legislative guidance.

Each of these will be discussed in turn.

Several preliminary points are worth noting. First, the question of what if any new evidence should be heard on appeal is separate from the question of whether the hearing should be oral or on paper. Although an oral hearing is required where new evidence is introduced,[184] the absence of new evidence does not mean there should not be an oral hearing. Appeal hearings in the court system are oral but rarely including the introduction of new evidence.

Secondly, the question of new evidence cannot be viewed in isolation from other issues such as grounds of appeal and the standard of review. For example, if an appeal is restricted to questions of law, it would be an unusual situation where new evidence would be relevant to the issues on appeal.

Thirdly, the choice between the different options requires an assessment of all the over-arching policy goals but in particular:

- fair and just decisions
- finality in a timely fashion, and
- cost effectiveness.

Finally, of the program or environmental characteristics (step two in the design process), the two most important are probably:

- nature and quality of the original decision (including the process used to reach the decision), and
- whether this is the type of case where a change of circumstances after the date of the original decision should be taken into account by the appeal body.

Appeal on the Record (No New Evidence)

The primary advantage of an appeal on the record is that it should result in a shorter (and also less expensive) appeal hearing. This occurs for two reasons: time is not spent on hearing oral testimony and the number of potential issues is often reduced, since findings of fact will usually

184 Although it is procedurally possible to introduce new documentary evidence via a paper hearing, this is not a common practice. The introduction of new oral evidence clearly requires an oral hearing.

not be at issue. The appeal body's task is to decide whether, on basis of the evidence before the original decision maker, that person erred.

The following are some of the factors which should be considered in assessing whether an appeal on the record will work appropriately in a particular review scheme:

- Was there a full and fair hearing or consideration when the original decision was made?
  - If the issues and evidence were adequately aired at first instance, this fact would support relying on the factual record of the original hearing.
- Is there an adequate documentary record of the original proceeding, including any exhibits and oral testimony?
  - An appeal on the record can work only if there is an adequate record of the original proceedings.[185] If a record does not exist, the appeal body will not be in a position to decide whether the original decision maker erred on the basis of the information before him or her. In those cases where oral testimony was given, a transcript of that testimony may not be necessary but there must be some other reliable record of what was said.[186]
  - If the process leading to the original decision is not one which regularly provides an adequate record, then an appeal *de novo* will usually be necessary.
- Characteristics of the appellants
  - An appeal on the record requires the appellant to focus his or her factual comments largely on the written record from the original hearing. This process works efficiently in cases where the appellant is represented by counsel or otherwise understands and accepts the inability to introduce new evidence on the appeal. If, however, the background of the appellant is such that significant hearing time is likely to be consumed in trying to keep the appeal on the record on track procedurally, the time and cost efficiencies of an appeal on the record may be reduced or lost entirely.

In those situations where an appeal on the record is the preferred option, a decision should also be made about how to deal with those cases that will inevitably arise where an adequate record is not available for whatever reason.[187] The two choices are to authorize the appeal body to hear

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185 If authority for this obvious proposition is needed, see *Kucher, supra*, at para. 45.

186 *Kucher, supra*, at para. 45-47.

187 This problem can arise from as simple a problem as a tape recording of evidence being unintelligible.

the appeal *de novo* in special circumstances or to include a remedial power to remit the matter back to the original decision maker for rehearing.[188] Efficiency would suggest using an appeal *de novo*; however, giving a discretion to the tribunal has its own disadvantages (discussed below). In making this decision, consideration should be given to how frequently the problem of an inadequate record is likely to occur.

Appeal De Novo *(All New Evidence)*

An appeal *de novo* is the appropriate choice in those cases where the over-arching policy goals are best achieved by disregarding the original decision and, in effect, starting all over. On the other hand, an appeal *de novo* is not appropriate in cases where the appeal is limited to questions of law.

There are a number of circumstances which may favour a *de novo* appeal in a particular review structure. Before turning to those factors, it is worth noting that the Australian Administrative Review Council's adoption of full merit review entails what would traditionally be called an appeal *de novo*. This is the principle underlying the proposed but not yet created Administrative Review Tribunal at the federal level in Australia. The present paper proceeds from the view that the nature of an appeal should be determined on a program area by program area basis.[189]

The following are the most important factors favouring an appeal *de novo* in a particular case:

- quick or summary original decision
  - There are a number of reasons why an original decision would be made in a relatively summary way, perhaps with little if any opportunity for input from the concerned individual. An obvious situation is where the original decision maker processes a high volume of cases most of which require minimal consideration in order to reach the appropriate decision.
- inadequate record from the original decision[190]
- where it is appropriate to focus on the facts as they exist at the time of the appeal decision

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188 *Cf. Kucher, supra*, at para. 47.

189 See the earlier discussion of a consolidated appeal tribunal. In the absence of such a tribunal, there appears little rationale for adopting a policy that all appellate tribunal appeals should be *de novo*.

190 See the discussion of this matter above in the context of appeals on the record.

- In cases where a decision depends on, for example, a person's medical condition or financial resources, an argument can be made that an appeal *de novo* (or at least the admission of some new evidence) should be available. For example, if the permanent prognosis for an injured worker changes between the date of the original hearing and an appeal hearing, it probably makes sense to hear new evidence on this point.[191] On the other hand, it may be possible to deal with this situation by simply admitting some new evidence without resorting to a complete rehearing via an appeal *de novo*. An alternative is to remit the matter back to the original decision maker. A further alternative is, where appropriate, to allow the claimant to file a modified claim. Both these alternatives, however, restart the process and delay the date when finality will be achieved. It depends on a range of factors in a particular program area whether a change in circumstances justifies having an appeal *de novo* or whether it is best dealt with in some other way.
- The frequency with which a relevant change of circumstances or fact occurs will determine whether an appeal *de novo* should be the general rule in a program area or whether it should be merely an option available at the discretion of the appellate body.

- an appeal *de novo* may be easier to manage than an appeal with new evidence but otherwise on the record.
  - Where only some new evidence is admitted on an appeal, the tribunal must consider how the new evidence should be balanced against the factual findings of the original decision maker. Anecdotal comments from at least one tribunal member suggest that it may be easier to conduct an appeal *de novo* rather than deal with a mixture of evidence on the record and fresh evidence.

There are several factors which militate against an appeal *de novo*:

- probably more expensive and longer than an appeal on the record or an appeal with only some new evidence admitted
- loss of the benefit from the resources invested in making the original decision (in those cases where the original decision was not summary in nature)

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191 This is example is used simply to illustrate the point about a change in circumstances which should perhaps be taken into account. Review structures for workers' compensation claims are being addressed in a separate forum; the comment in the present paper is not intended to be an informed suggestion for how the workers' compensation scheme should be structured.

- may create frustration for the original decision maker
    - Since an appeal *de novo* ignores the original decision for all practical purposes, it is likely a source of frustration for original decision makers who see their work cast aside.
- may discourage parties from putting their best case forward to the original decision maker
    - Anecdotal evidence[192] suggests that parties, for financial or other reasons, do not always put their best foot forward at the original level decision making in those cases where they know they will have a second opportunity if the first decision does not go in their favour. Although this may make sense from the individual's perspective, it is not a good use of system resources and should not be encouraged.
- where there is a lack of expertise at the appellate level
    - In those cases where the original decision was a considered decision by a person with subject matter expertise, an appeal *de novo* to a tribunal without that expertise is problematic. This factor is more likely to be important in cases where the appeal is to court.

Burden of Proof and Deference

When an appeal is heard *de novo*, the question can arise as to who has the burden of proof.[193] Put somewhat differently, what if any deference should be given to the decision under appeal? A related but separate question is which party should present his case first at the appeal hearing: the appellant or the respondent?[194]

In appeals on the record (or where only some new evidence is admitted), the appellant has the burden of establishing that the decision should be reversed or altered in some way. The law is

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192 In addition, see *Chan v. Medical Services Commission*, June 6, 1996, B.C.S.C., Van. Reg. No. A953649 at para. 12.

193 This is also sometimes referred to as the onus of proof. The term is used here in the sense of who has the burden of establishing his case. For example, in a trial the plaintiff has the burden of proof; if he does not make out his case, he will lose. Burden of proof is used here in a sense different from standard of proof, which refers to whether a matter must be established on a balance of probabilities (the usual civil criterion) or, for example, beyond a reasonable doubt (what the crown must establish in a criminal prosecution).

194 For practical reasons, it is possible in some situations that the appropriate procedure would be for the respondent to present its case first even in a situation where the burden of proof may remain with the appellant. For example, if the case depends on several days of technical evidence in support of an order against an individual, it will in at least some circumstances make sense for the hearing to begin with the respondent (*qua* plaintiff) setting out the case against the appellant (defendant).

not entirely clear, however, when the appeal is *de novo*. From one perspective, the burden should be on the appellant since, if the appeal does not succeed, the original decision will remain in effect. On the other hand, the primary purpose of an appeal (or trial) *de novo* is to start afresh. Passages from two cases serve to illustrate the judicial uncertainty over this issue. In *Hicks v. West Coast General Hospital*, the court stated:[195]

> *The necessary implication of proceedings de novo is that the tribunal must decide the matter only on the evidence before it. It should not give any weight or "curial deference" to the conclusions of the body from which the appeal is taken, beyond that which may properly arise from the evidence....The intended purpose of the appeal is frustrated if the appellate tribunal gives deference to the subjective judgments below. It strikes to the heart of the de novo proceedings and amounts to a grave jurisdictional error.*

This approach is consistent with the Court of Appeal's description of a *de novo* appeal in *Dupras* (quoted earlier).[196] *Dupras* did not involve issues of deference and burden of proof.

Another line of cases indicates, however, that it is appropriate to give deference to the original decision at least where the original decision maker had special expertise. In *Woodward v. Society of Notaries Public of British Columbia*, the court relied on an earlier Supreme Court of Canada case and stated:[197]

> *The "de novo" provisions allow the Supreme Court judge to substitute his or her opinion for that of the directors [of the Society of Notaries Public]. Where the decision of the directors involves special expertise, curial deference must be accorded that decision. The court is obliged to take the special knowledge of the directors into account.*

In a 1981 case involving a *de novo* appeal to court from a decision of the registrar of travel agents, McLachlin Co.Ct.J. (now Chief Justice of Canada) adopted this approach but then concluded that the original decision maker had no particular expertise relevant to the issues on

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195 January 21, 1993, B.C.S.C, Van. Reg. No. A921720, at para. 9. See also the dicta in *Lagace v. Canada (Minister of National Revenue)*, June 2, 1998, Tax Court of Canada.

196 *Supra*, at para. 15:
> "A trial de novo ignores the original decision in all respects, except possibly for the purposes of cross-examination."

197 February 16, 1993, B.C.S.C., Van. Reg. No. A901160. See *Lamb v. Canadian Reserve Oil & Gas Ltd.*, [1977] 1 S.C.R. 517; *Cowichan Drycleaning Centre Ltd. v. Linge*, March 30, 1988, B.C.Cty.Ct., Duncan Reg. No. 1379; *Imperial Oil Resources Ltd. v. Tulliby Lake Stockman's Assn.*, September 27, 2000, Alta. C.A., No. 0003-0280-AC; *Tuplin v. Canada (Indian and Northern Affairs)*, 2001 PESCTD 89 (P.E.I.S.C.-T.D.) at para. 20. In *Steele v. M.N.R.*, [1988] T.C.J. No. 24, the Tax Court stated:
> "The Court reminds the Appellant that, in a trial "de novo" as is the case, the burden of proof rests on the Appellant to adduce evidence to substantiate his contention contrary to the Minister's determination."

appeal.[198] Likewise, it appears there should be no deference in those cases where the appellate tribunal has expertise equivalent to that of the original decision maker.[199] To add yet more interest, the British Columbia Supreme Court has ruled that burden of proof is an irrelevant matter when the appeal hearing is inquisitorial rather than adversarial in nature.[200]

If deference is given to the original decision, the burden of proof will remain with the appellant on a *de novo* appeal: he will not succeed unless he shows that the original decision should be changed.[201]

This is an area where legislative direction would be beneficial. It would provide assistance to the appellate body and to the parties appearing before it. Parties would know prior to the hearing who has the onus of proving what and would be able to prepare for the hearing as efficiently as possible. In addition, legislative certainty would preclude hearing (and possibly judicial review) time spent on arguing the burden of proof issue.

Some New Evidence

In practice, the most common type of hearing held by appeal tribunals is one where some new evidence is admitted but the focus remains on whether the original decision was incorrect. As with an appeal on the record, a reasonably adequate record of the original hearing must exist for this type of hearing to be appropriate.

This option is most likely to be appropriate when a reasonably adequate hearing occurred at first instance but one or more of the following factors exist:

- new evidence has become available since the original decision
- in the case of evidence that was available at the time of the first hearing, the appellant has a legitimate reason why he or she did not produce that evidence

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198 *Bay Travel Centre Ltd. v. Registrar of Travel Services*, July 30, 1981, B.C.Cty.Ct., Van. Reg. No. F803173.

199 *Saunder Farms Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, January 19, 1995, B.C.C.A., Van. Reg. No. CA017895 at para. 39 *per* Southin J.A.

200 *British Columbia (Assessor of Area No. 10--Burnaby/New Westminster) v. Haggerty Equipment Co.*, May 30, 1997, B.C.S.C., Van. Reg. No. A970220 at para. 14. Referring to the untypical nature of the appeal hearing, the court stated (para. 14):

> "The proceedings are inquisitorial and not adversarial....Because the proceedings are inquisitorial, the onus is really on no party."

201 *Cf. Cowichan Drycleaning Centre Ltd. v. Linge*, March 30, 1988, B.C.Cty.Ct., Duncan Reg. No. 1379.

- Depending on the characteristics of the appellant and his or her particular reason for failing to introduce available evidence at the first hearing, the goal of reaching a fair and justice result sometimes suggests allowing the introduction of this type of evidence on appeal.[202] The danger, however, is that such a practice may not provide the necessary encouragement for individuals to put their best foot forward at the original hearing. From a systemic point of view, it is more efficient if all available evidence is produced at the original hearing than if the introduction of some evidence is delayed until the appeal hearing.

- a breach of natural justice or procedural fairness occurred in the process leading up to the original decision

  - Much depends on the significance of the procedural irregularity. If it can be corrected by the admission of new evidence, that may be an appropriate solution. If, however, the breach is more serious, the only appropriate solution may be to remit the case back to the original decision maker for rehearing or to hold a *de novo* appeal (if there is a statutory power to do so).

If an appeal tribunal is given the power to hear new evidence, several second level matters should be addressed. First, should legislation expressly state that the tribunal can hear new evidence on an appeal or is it appropriate to rely simply on the grant of a power to compel witnesses and the production of documentary evidence? A second and closely related question is whether a party who wishes to introduce new evidence on an appeal should have a right to do so or should have to obtain the tribunal's permission before doing so. A third issue is whether the ability to lead new evidence should be unfettered or should be subject to statutory limitations, such as that the evidence was not available at the time of the first hearing. The answers to these questions depend on factors some of which may vary from program area to program area. One general principle, however, needs to be kept in mind. The type of hearing should be readily understood from reading the legislation creating the appeal. To the extent that legislation provides clarity on these matters, there is less room for uncertainty and the consequential expenditure of time and resources spent in resolving these issues. The process will be more accessible to those using it.

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202 To take an extreme example, a person with a mental disability might be excused for not producing all relevant evidence at a hearing about receiving a government benefit. In contrast, a physician represented by legal counsel would in most cases have little excuse for not producing all relevant evidence in a case involving his billings to the Medical Services Plan; appeals from a decision that a physician must repay money to the Medical Services Commission are heard under section 43 of the *Medicare Protection Act*, R.S.B.C. 1996, c. 286.

At the Tribunal's Discretion

One option is to give the appeal body an express discretion about how it conducts the appeal: pure appeal, appeal on the record but with some new evidence, or *de novo*. This discretion could be left as an obligation to decide the type of appeal in each case or could be phrased as a rule, for example, that the appeal is on the record (or not *de novo*) unless the appeal body decides otherwise.[203] The latter choice is preferable since it provides much greater procedural certainty than leaving the issue to be resolved in each case. A lack of certainty about the procedure on appeal may in some cases suggest to individuals that it is not necessary to put their best foot forward at the original level hearing.[204]

In addition to providing certainty, a provision setting out a default rule unless the appeal body rules otherwise is more efficient than leaving the issue at large to be decided in each individual case. If the issue is to be resolved on a case by case basis, it would probably require a preliminary hearing to decide how the appeal would be conducted -- a time consuming and expensive exercise.

No Legislative Guidance

Although technically an option, providing no legislative guidance has little to commend it. This is an area where legislative clarity is clearly beneficial. It saves time and expense spent in resolving disputes about the type of appeal that the tribunal (or court) is authorized to conduct. In addition, individuals can conduct themselves at the original level hearing with advance knowledge of the type of appeal that will occur if the case proceeds that far.

If legislation is completely silent (including no provisions for compelling witnesses or the production of documentary evidence), one must fall back onto the strict law as set out in *Kucher* and *Dupras*: it is an appeal on the record. The practical difficulty is that there is a quite natural desire on the part of some appeal tribunals to reach a fair and just decision even if it requires hearing new evidence. Not infrequently, appeal tribunals are subject to pressure from an appellant to be allowed to introduce new evidence. Anecdotal information suggests this can lead

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203 Small claims appeals provide a useful analogy. Section 12 of the *Small Claims Act*, R.S.B.C. 1996, c. 430 states:

> "An appeal to the Supreme Court under this Act
> (a) may be brought to review the order under appeal on questions of fact and on questions of law, and
> (b) must not be heard as a new trial unless the Supreme Court orders that the appeal be heard in that court as a new trial."

204 See, for example, *Chan, supra*, at para. 12. In addition, anecdotal evidence suggests that some persons may, for tactical or other reasons, not put their best case forward at first instance but then try to do so on appeal.

to new evidence being admitted in appeals which, strictly speaking, should be solely on the record. The result is procedural uncertainty. For this reason, it appears preferable that the legislature give an unambiguous and explicit indication of the type of appeal it is creating.

Power of Reconsideration

Reconsideration was discussed earlier as a form of internal review of original decisions. Reconsideration of decisions by an appeal tribunal can also occur. In both cases, the primary issue is the same: obtaining the appropriate balance between reaching just and fair decisions and achieving finality in a timely way. Finality is a more pressing issue when dealing with reconsideration of appeal decisions than when reviewing original decisions. The reason is that at least one level of review (appeal) of the original decision has already occurred. At this stage in the process, the need to achieve finality gains increased importance. A statutory power of reconsideration for appeal tribunals may nonetheless be appropriate in some circumstances.

The decision whether to grant a statutory power of reconsideration, as with most other design decisions, must take into account the characteristics of the particular program area (step 2) as well as the relative importance of the over-arching policy goals (step 1). If a power of reconsideration is a possible option for an appeal tribunal, there are a number of specific points requiring decision. These decisions affect the way in which the power of reconsideration will operate in practice.

As a general rule, a person should not have a right to require reconsideration of a decision by an appeal tribunal. Reconsideration should be available only with leave of the appeal tribunal.[205] This is in contrast to many internal review schemes where a right to obtain internal review (possibly reconsideration by the actual original decision maker) may be appropriate. For those cases where an appeal tribunal sits in panels, consideration should be given to whether the reconsideration ought to be undertaken by the original panel (assuming the members of that panel are still available) or whether the reconsideration should be undertaken by a different panel of the tribunal.

Another important matter is whether the statutory power of reconsideration should be at large or should be limited to specified grounds.[206] One of several options is to grant a power of reconsideration on the ground that "new evidence has arisen, or has been discovered

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205 There are a variety of ways in which a leave requirement can be drafted; it is not necessary to require a formal leave application.

206 As noted above, the common law powers of reconsideration do not appear to be excluded by a statutory power granting reconsideration in limited but different circumstances: *Atchison, supra.*

subsequent to the hearing of the matter".[207] New evidence coming to light is probably one of the more frequent and justifiable reasons for reconsideration of an appeal board's decision.[208] Rather than attempting to enumerate the grounds when reconsideration may occur, another option is to entrust this matter to the discretion of the appeal board. The advantage of this approach is that it is impossible to foresee all circumstances when it may be appropriate to exercise a discretionary power of reconsideration. The obvious disadvantage is that it leaves the issue somewhat uncertain.

There are two other ways in which the loss of finality from a reconsideration power can be minimized. First, the power of reconsideration can be circumscribed by a statutory time limit. If this option is chosen, a decision must also be made whether the appeal board should have the ability to extend the time limit in special circumstances. Secondly, appeal boards sometimes make preliminary rulings on issues prior to holding the main hearing and deciding the case on the merits. As a general rule, there should be no power to obtain reconsideration of a preliminary or interlocutory ruling. Reconsideration should be available only for final decisions. Thirdly, in order to avoid abuse, it may be prudent to allow only one reconsideration of an appeal decision. Such a limitation is more important where there is no time limit on the power of reconsideration.

Privative Clause

When an appeal to a tribunal is created, a decision should be made whether to use a privative clause to limit judicial review of the tribunal's decision. The appropriateness of a privative clause (and how it is worded) depends on the extent to which the courts should give deference to the particular appeal board.[209]

Judicial reviews of appeal tribunal decisions are usually commenced by individuals rather than by the government. Occasionally, however, an appeal decision adverse to government is of sufficient importance that a judicial review is commenced.[210] This fact should be kept in mind

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207 See the reconsideration power of the Workers' Compensation Board Appeal Division in section 96.1(2) of the *Workers' Compensation Act*.

208 Although there is at least one contrary case, it is often stated that the power of reconsideration does not extend to rehearing a case solely because new evidence has come to light; see the discussion earlier in this paper.

209 For a discussion of this matter, see earlier in this paper and also the separate background paper entitled *Standard of Review on Judicial Review or Appeals* by Frank A. V. Falzon.

210 For example, an appeal tribunal's decision to reverse a decision by a government official may have significant cost implications because of the decision's impact on other similar cases. Although tribunal decisions do not have the precedential legal effect of a decision of a superior court, they may have a practical impact on either the substance or the process of future decisions by the government official.

when assessing the extent of any privative clause placing restrictions on the availability of judicial review.

Other Design Matters

A number of other matters should be considered whenever a right of appeal is created.

A decision should always be made about the time limit within which the appeal must be commenced. Because of the need to achieve finality in a timely way, rarely if ever will it be appropriate not to have a time limit for commencing an appeal. Although 30 days or 60 days are typical time limits, identification of the appropriate time limit may depend on particular aspects of the program area and its users. Consideration should also be given to whether the appeal board should have the ability to extend the time limit in special circumstances.[211] In many cases, this is an appropriate power to give the board.

When an appeal is created, consideration should usually be given to the status of the original decision while the appeal is pending. Should the original decision remain in the effect or should it be stayed?[212] In the context of appeals within the court system, the general rule is that the original decision remains enforceable unless it is stayed by the court.[213] Legislation can provide for one of four options:

- no stay in any case;
- a stay in all cases;
- no stay unless the appeal board orders otherwise; or
- a stay unless the appeal board orders otherwise.

The appropriate choice depends on the particular program area. A factor that should always be kept in mind, however, is the extent to which someone (whether a private individual or the public) would be prejudiced by the granting or not granting of a stay.

In most situations, it is obvious who should have the ability to appeal a particular decision. In some cases, however, there may be a person who has an indirect interest in the outcome of a particular matter but who may not, for example, have been the applicant for permission to carry out a particular activity. "Standing" is the term used to describe the law governing who is entitled

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211 Situations can occur where it may appear unfair to insist upon a rigid application of, for example, a thirty day time limit. Where the time limit runs from the date of the original appeal board decision, cases have occurred where there has been delay in communicating the decision to the concerned party with the result that he or she has had little if any time within which to commence the appeal.

212 When an order is stayed, it remains a valid order but cannot be enforced or otherwise given effect.

213 Under section 18 of the *Court of Appeal Act*, a judge of that court may grant a stay of the order under appeal.

to participate in an appeal. Although it is rare that someone other than the directly concerned person should have standing, there are circumstances where that may be appropriate. In any event, it is a matter which should be addressed when designing the structure of an appeal process.

Finally, there is the issue of privacy rights versus the public interest in openness of the administrative justice system.[214] The issue arises most obviously where a tribunal may hear personal and possibly sensitive medical information about a person. For tribunals where this may occur, statutory guidance about maintaining confidentiality of personal medical information is probably of assistance.[215]

Encouraging Settlement

An important feature common to cases before appeal boards and appeal courts is that settlement of the case before the appeal hearing may be in everyone's interest. Especially where settlement occurs well before the appeal hearing, it reduces costs and the period of time before finality is reached. This benefits both the parties in a particular case and the adjudicative system as a whole.

In the administrative law context, different types of cases fall on a continuum of suitability for settlement. As a general rule, cases between private parties which do not raise public law issues are most likely to be appropriate for settlement. At the other end of the continuum are cases between government and private persons where the relevant statutory law admits of only one possible outcome, the government wants to establish a new precedent or there is an open public law question which the government wants to address. In these cases, government will probably wish to obtain a ruling from the appellate body. There are, however, a large number of cases between government and private individuals where settlement is a viable option.

There are at least two ways in which pre-hearing settlement can be fostered where it is appropriate. First, pre-hearing conferences will in some cases be a useful tool. Depending on the rules governing procedures of the appeal board, it may be useful to create an express statutory power to hold a pre-hearing conference. Secondly, linked to this but separate is mediation as a tool for facilitating settlement. In the context of designing an appeal scheme, the question is not whether mediation is a useful tool but rather whether a statutory mandate should

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214 The Australian Administrative Review Council addressed this issue in *Better Decisions, supra*, at pp. 44-49.

215 In those situations where this may be an issue, careful consideration needs to be given to the legal and constitutional issues.

be provided for it in program areas where it may be helpful. The role of mediation in the regulatory and administrative law context is beyond the scope of this paper. Where, however, mediation appears to be a useful tool, consideration should be given to whether there is an advantage to providing a statutory basis for mediation (including possibly making it mandatory) or whether it is a matter best left to be addressed outside the statutory framework for the appeal board.[216]

If the parties to an appeal settle their dispute, the issue arises of the mechanism for giving legal effect to the settlement. Since the original decision remains in force until set aside or varied on appeal, a settlement should be reflected in an order of the appeal board. The practical issue is whether the parties should have the ability to file a consent order[217] with the appeal board or whether the board should have a discretion and perhaps an obligation to review the proposed consent order to determine whether it is appropriate not just in a technical legal sense but also in a broader discretionary sense.

The Australian Administrative Review Council made the following policy comment on allowing (or requiring) an appeal tribunal to review a settlement agreed to by the relevant government agency and the concerned individual:[218]

> *If tribunals reviewing administrative decisions are generally charged with finding the single preferable decision from among those decisions that are lawful in terms of the relevant legislation, is it appropriate for them to allow the parties to agree on what is the preferable decision and leaving it to the tribunal to determine only whether the decision agreed upon is within its lawful range?*
>
> *If the agency and the applicant seeking review of an administrative decision are able to agree on a decision that is lawful, it is difficult to see what interests would be served by any further expenditure of resources. Provided the tribunal is satisfied that the applicant has not been pressured or coerced into accepting a less favourable outcome, there should be no obstacle placed in the way of such settlements.*

This approach appears reasonable as a general proposition; however, its appropriateness should be considered within the context of the particular appeal structure under review.

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216 Although beyond the scope of this paper, a matter for future consideration is whether it would be advantageous to have legislation dealing generally with mediation in the administrative and regulatory context rather than addressing the issue program area by program area in individual statutes. On the general issue of statutory powers and procedures legislation, see the separate Background Paper *Statutory Powers and Procedures* by Frank A.V. Falzon, released by the Administrative Justice Project in 2002 and available at: http://www.gov.bc.ca/ajp/rpts/.

217 Such as occurs when a typical consent order is filed in court proceedings.

218 *Better Decisions, supra*, p.53.

In those situations where it may be appropriate to allow the parties to obtain a consent order from the appeal board without giving the board an opportunity to review the substantive content of the order, the prudent course of action would be to have a statutory provision expressly authorizing such a course of action.[219]

Matters Not Unique to Appeal Tribunals

There are a number of matters relevant to all administrative tribunals whether or not they exercise an appellate function. It is beyond the scope of this paper to address all these matters; however, a few warrant individual attention in the context of appeal tribunals.

Should the legislation creating a particular appeal tribunal require specific qualifications for some or all of the tribunal members? In some cases, it may be appropriate to have a requirement that some members of the board have professional qualifications in the subject matter area dealt with by the board[220]; in other situations, it may be appropriate that the chair of the board (and any panels of the board) be a lawyer.[221] The appropriateness of requiring certain members of a board to have specified professional qualifications depends, in part, upon the complexity of the factual and legal issues as well as the typical impact of decisions of the appeal board. In the case of lawyers, an additional consideration is the extent to which the appeal board's approach should reflect the type of processes used in the courts. A lawyer chair is probably more likely than a non-lawyer chair to adopt procedures which reflect those used in the judicial system.

In most cases, an appeal board should be given the express power to sit in panels.[222] Another generally useful power is to authorize a board member to complete a case in which he participated but where the board's decision has not been rendered prior to termination of his

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219 Note, for example, the following statement by Sara Blake, *Administrative Law in Canada* (2d ed.) (Toronto, 2001) at p.79:

> "Parties who have reached agreement on the resolution of proceedings must obtain the approval of the tribunal to the agreement before it can take effect. A tribunal is under no obligation to accept an agreement that it regards as unfair or that is contrary to the objects of the statute pursuant to which the proceeding takes place."

220 For example, the *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c.181, s. 27 requires that some members of the Health Care and Health Facility Review Board must be "health care providers".

221 For example, the chair of the Medical and Health Care Services Appeal Board must be a lawyer: *Medicare Protection Act*, R.S.B.C. 1996, s. 286, s. 41.

222 The only significant drawback to the use of panels is the possibility that different panels will reach inconsistent decisions on similar sets of facts. This difficulty is outweighed by the need to use panels in program areas where there are too many cases for the full board to hear them all. There are a number of practical ways in which the risk of inconsistency can be minimized.

appointment.[223] This type of provision typically exists for judges who cease to hold office before rendering a decision in a case which they have heard.[224]

Judicial Review

If a decision is made to rely solely on judicial review, a decision must be made whether to use a privative clause. The answer to this question depends on what, if any, deference it is felt the courts should give to the decision maker under review.[225] If no deference is desired, probably no privative clause should be used. On the other hand, a fulsome privative clause will increase the likelihood of the courts' giving deference to the original decision maker.

9 MULTIPLE LEVELS OF REVIEW

In what circumstances is it appropriate to have multiple levels of review? If all other factors are the same, a review process with two layers will take longer to reach finality than a process with only one layer. Nonetheless there are situations where more than one layer is appropriate. This section of the paper explores when those situations exist.

As noted earlier, the decision whether to utilize a multi-level review scheme is a step four (macro-structural) question. In assessing the individual components of a multi-level system, the factors discussed above under step four all remain relevant. There are, however, additional considerations specific to the over-all operation of a multi-layer system. These are the matters addressed in this section of the paper.

Despite the almost infinite variation in how a multi-level review system can be structured, the possibilities fall, for the most part, into one of the following three categories:

- internal review combined with external appeal
- multiple levels of internal review and/or (non-court) appeal
- appeal to a tribunal followed by an appeal to court

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223 This power currently exists for members of the Labour Relations Board (s. 130(2) of the *Labour Relations Code*, R.S.B.C. 1996, c. 244); the Appeal Division of the Workers' Compensation Board (s. 85(1) of the *Workers' Compensation Act, supra*); and the Workers' Compensation Review Board (s. 3(4) of the *Workers Compensation Act (Review Board) Regulation*, B.C. Reg.32/86; see also s. 4 of the earlier *Boards of Review Regulation*, B.C. Reg.31/81).

224 *Supreme Court Act*, R.S.B.C. 1996, c. 443, s. 6.

225 For a full discussion of this issue, see the Background Paper, *Standard of Review on Judicial Review or Appeal*, by Frank A.V. Falzon, released by the Administrative Justice Project in 2001.

Each category is discussed separately since there are factors unique to each category -- in addition to the factors common to each.

As an example of one type of multi-level review structure, Appendix B contains a flow chart which illustrates a scheme with internal review of the original decision coupled with appeal to a tribunal with a power of reconsideration. Since judicial review is always a possibility, it is also included on the chart.

General Principles

The principles that should govern the design of multi-level review schemes are no different from those for less complex review structures. The first step is identify and prioritize the over-arching goals of the review structure. The purpose of any review scheme is to achieve fair and just decisions in a timely and cost efficient manner. In addition, there are also the other goals identified in step one. It bears repeating that the relative importance of these goals may vary from program area to program area. The second step is also critical: an assessment of the program area characteristics relevant to how the multi-level review structure will operate. As discussed below, one relevant characteristic may be the existence of a high volume case load.

In addition, the general principles of legislative clarity, proportionality and avoiding unnecessary diversity should also be taken into account.

Internal Review and External Appeal

The simplest form of multi-level review is internal review followed by appeal to an external body. When it works well, a single layer of internal review is a relatively quick, informal and cost effective way of remedying many incorrect decisions. These and other general benefits of internal review continue to exist even where appeal to an external body is also available. Where external appeal exists, resolution of cases via internal review has the benefit of reducing utilization of the typically slower and more expensive appeal process.[226]

The primary question for decision is whether internal review should be a mandatory step[227] before a person can proceed to the external appeal option or whether internal review should be at the option of the individual. The primary argument against making it mandatory is what the Australian

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226 *Cf. Better Decision, supra*, at pp. 122-123 (para. 6.53).

227 A current example is the requirement in appeals to the Forest Appeals Commission that most decisions must first go through the statutory internal review mechanism: *Forest Act*, R.S.B.C. 1996, c. 157, s. 146(2).

Administrative Review Council refers to as "appeal fatigue".[228] This is the recognition that multiple layers of review cause some individuals not to pursue all their review options. In this sense, a mandatory first layer of internal review may act as a barrier to obtaining the benefits of external appeal. The importance of this consideration obviously increases with the number of layers of review. Another argument against mandatory internal review is that in some cases it will be clear that the only likelihood of a changed decision is via appeal to the external appeal body; in these situations, compulsory internal review may be an inefficient use of time and resources.

Balanced against these arguments is the fact that the limited available empirical data suggests that mandatory (as distinct from optional) internal review reduces the number of cases proceeding to appeal.[229] The reduction of cases going to appeal will usually result in a more efficient use of time and resources even though there may be some risk of appeal fatigue inappropriately deterring individuals from proceeding to external appeal. The extent of this risk depends to some extent on the way in which the internal review scheme operates in practice.

The conclusion reached by the Australian Review Council was that the issue of mandatory versus optional internal review should be decided on a program area by program area basis.[230] A similar approach is reasonable in British Columbia. As with other aspects of a review scheme, an appropriate decision needs to take into account the possibly unique characteristics of each program area.

Multiple Layers of Internal Review and/or External (Non-Court) Appeal

When, if ever, should a review scheme have multiple layers of internal review, multiple layers of administrative appeal or perhaps multiple layers of both?

British Columbia currently has several multi-level review structures. All were presumably created in the hope of providing an appropriate review scheme yet concerns exist over at least some of them. This section of the paper provides general comments on when it may be appropriate to create a multi-level system. It does not suggest review structures for specific program areas.

Multi-level review systems have obvious drawbacks. A review scheme with four levels takes longer and is more expensive (both financially and in human time) than a system with two levels, if all other factors are equal. Moreover, in the case of more than one level of internal review,

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228 *Internal Review, supra*, p. 16.

229 This data is from Australia: see *Internal Review, supra*, p. 17.

230 *Internal Review, supra*, p. 18 (Recommendation 3).

accessibility is adversely affected if "appeal fatigue" sets in and deters some individuals from reaching an external appeal body. For these reasons, a multiple layer review structure is rarely suggested except in a program area with a high volume of cases.[231] This point is addressed below.

Existing Multiple Level Review Structures

A brief overview of existing multi-level structures will assist in understanding the issues in this area. Several tribunals in British Columbia currently exercise a second level of appeal.[232] A few exercise a second level of appeal in all cases:

- BC Benefits Appeal Board
- BC Benefits Tribunal
- Disaster Financial Assistance Appeal Board

The others exercise a second level of appeal in only some cases:[233]

- Electrical Safety Appeal Board
- Elevating Devices Safety Board
- Gas Safety Appeal Board
- Power Engineers and Boiler and Pressure Vessel Safety Appeal Board
- Property Assessment Appeal Board
- Workers' Compensation Board – Appeal Division
- Worker's Compensation Board – Medical Review Panels

Several of these boards operate in program areas with a high volume of cases (BC Benefits, Property Assessment and Workers Compensation). Of the remaining tribunals listed above, the four safety appeal boards exercise an original as well as a second level appeal jurisdiction. For example, the Gas Safety Appeal Board hears appeals from decisions and orders of the chief

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231 E.g., McRuer, *supra*, at pp. 124-125. An exception is the proposal for second tier review panels within the proposed Administrative Review Tribunal in Australia.

232 This information is current at the date of writing: February 2002.

233 In addition to these boards, a decision under appeal to the Forest Appeals Commission must first have been through a review process internal to the Ministry of Forests; there is, however, an exception when the Forest Appeals Commission hears an appeal from a decision of the Chief Forester under the *Forest Act*. Although not an appeal to persons outside the ministry, this internal review process bears several hallmarks of an appeal. For decisions under the *Forest Act*, R.S.B.C., 1996, c. 157, section 146 requires that the decision first have gone through the review described in ss. 143-145; for decisions made under the *Forest Practices Code*, R.S.B.C. 1996, c. 159, section 130(3) requires that a review have occurred under section 129; for appeals under section 41 of the *Range Act*, R.S.B.C., c. 396, the decision must first have been reviewed by the regional manager.

inspector;[234] these can be decisions made by him either at first instance or in his appellate role from a decision by a local inspector.[235]

The BC Benefits (income assistance) program currently has a number of levels of reviews.[236] After internal review, there are two levels of review external to the ministry. In 2000, the program received 105,000 new cases.[237] The first statutory level of review is a formal internal reconsideration by the ministry.[238] In practice, there is also an earlier internal review by a district supervisor. The first level of external review is to a three person tribunal consisting of a person appointed by the appellant, a person appointed by the ministry and a chair chosen by the first two persons.[239] The second level of appeal is to the BC Benefits Appeal Board. One reason given for creation of the existing appeal board was to reduce the number of cases going to court on judicial review.[240]

Approximately 1.7 million property assessments are contained in the annual assessment roll. The first level of review is by review panels appointed by the minister.[241] The reviews are sometimes characterized as "quick and dirty". By statute, the review panels must complete their adjudications by March 16th of each year. On average, 25,000 cases are heard annually by review panels. The vast majority of cases end at this level. In 2000, 820 cases were taken to the second level of appeal: the Property Assessment Appeal Board.

The Workers' Compensation Board received 184,131 new cases in 2000. The review structure for compensation claims is complex. Medical Review Panels can receive cases at several stages

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234 *Gas Safety Act*, R.S.B.C. 1996, c. 169, s. 27. Prior to creation of the Board, an appeal from a decision of the chief inspector lay to the minister. Under section 25(2) of the *Gas Act*, R.S.B.C. 1960, c. 161, the minister could have a person with "expert knowledge" to assist him.

235 For example, the chief inspector has power to revoke or suspend a gas fitter's license (s. 24). Under section 25, he hears appeals from decisions of inspectors and local inspectors.

236 As a result of the Core Services Review, the government announced in January 2002 that the number of levels will be reduced.

237 A table is set out below, comparing key statistics for this program with those for property assessment and workers' compensation.

238 BC Benefits (Income Assistance) Act, R.S.B.C., c. 27, s. 11 and Income Assistance Regulation, B.C. Reg. 75/97, ss. 67-69.

239 *BC Benefits (Appeals) Regulation*, B.C. Reg. 271/96, s. 3 as am. There is a process for selecting a chair if the two nominated persons cannot agree on the choice of a chair.

240 Hon. J. MacPhail, *Hansard*, June 19, 1995, p. 15719. This reduction occurred. For example, one judicial review decision was rendered in 2000; the application for judicial review did not succeed.

241 *Assessment Act*, R.S.B.C. 1996, c. 20, s. 31.

in the process.[242] The primary level of external review, however, is appeals to the Workers' Compensation Review Board. It received 14,460 new appeals in 2000; workers were at least partially successful in 47% of these appeals. The Review Board has more than 40 full time adjudicative members. There is currently a significant backlog of appeals at the Review Board.[243] The second level of appeal is to the Appeal Division of the Workers' Compensation Board. In 2000, it received 1,610 new appeals of which approximately one third were partially or completely successful. Five judicial review decisions were rendered in 2000; none were successful.

The following table summarizes data for each of these three high volume systems and illustrates the significant reductions in the number of cases at each level of appeal:[244]

Comparison of Annual Figures (2000)

	# New Cases	First Level of External Appeal		Second Level of Appeal		Judicial Review	
		# New Appeals	Success Rate (partial or complete)	# New Appeals	Success Rate (partial or complete)	# Cases Decided	Success Rate
BC Benefits	105,200 (227,065 total cases)	N/A	N/A	434	27%	1	0%
Property Assessment	1,700,000	25,000	N/A	820	N/A	N/A	N/A
Workers' Compensation	184,131	14,460	47%	1,610	34%	5	0%

Notes: N/A = not available to author.

This information on three high volume program areas highlights the magnitude of the case load faced by any system for making and reviewing original level decisions in this type of program area.

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242 In 2000, the Medical Review Panel received 492 new cases (Workers' Compensation Board of B.C. *2000 Annual Report*, p. 4).

243 In 2000, there was approximately a 20 month delay for cases proceeding to an oral hearing: Workers' Compensation Review Board, *Annual Report 2000*, p. 15.

244 The data is limited to that available to the author at the time of writing. Notes to data in the table:

1. For benefits under BC Benefits, the success rate is the measure of success by the appellant applicant for a benefit.
2. The number of new cases for BC Benefits is based upon the recent monthly average of new applicants and persons returning to income assistance.
3. The above table does not include the number of BC Benefits cases dealt with by the Ministry's internal review process: 6369 cases reconsidered (28% resolved in favour of client)
4. The figures for Workers Compensation appeals exclude appeals to Medical Review Panels and also employer appeals on assessments or related matters. The figures for both these categories are insignificant when compared to the overall number of appeals on which decisions are rendered. The first level of appeal refers to the Workers Compensation Review Board.
5. For judicial reviews, 2 new applications were filed in 2000 with respect to decisions of the BC Benefits Appeal Board.
6. Most of the data in this table was obtained from the annual reports of the tribunals in question.

High Volume Program Areas: Comments

The dilemma in structuring an appeal/review scheme for a high volume program area is how to manage the available resources (human and financial) so that one obtains the optimum balance between timeliness and reaching ultimately fair and just decisions.

Two preliminary comments are important. First, in assessing whether finality is achieved within an appropriate time period, several measures should be looked at: (i) the average length of time for a case to reach completion, (ii) the maximum time span within which a significant majority of the cases are resolved, and (iii) the length of time that the exceptional cases take before reaching a conclusion. An ideal system would have acceptable outcomes on all three measures. In contrast, a review structure which eliminates delay problems associated with the exceptionally long cases but which in practice lengthens the time period within which the majority of cases are resolved would simply be replacing one problem with a new and possibly less acceptable problem.

Secondly, a variety of matters other than the number of layers of review can affect the timeliness with which a case proceeds through the system. These are addressed near the end of the paper but include matters such as the skills of the persons conducting the internal review or appeal, provision of adequate staff and financial resources for the review process, and case management procedures by tribunals.

As indicated earlier, the nature and quality of the initial decision is a factor which must always be considered in designing a review structure. This is especially true, however, in the context of high volume program areas. In these program areas, the processes for making the original decision and for reviewing that decision must be carefully integrated.

The crux of the issue lies in the fact that many cases in a typical high volume program area do not require highly skilled adjudication. For these cases, the correct decision is obvious and can be made appropriately by someone other than a senior official. From one perspective, it does not make sense devoting significant adjudicative resources to this type of decision. On the other hand, some cases raise complex factual and legal issues that require more time and a more sophisticated decision making process in order to reach a fair and just decision. This issue has a direct impact on the appropriate number of layers of review in a particular program area.

There are several ways conceptually in which the high volume issue can be approached. One is to have all cases, at the point of entry, go through the same initial decision making process and

then have internal review followed by one or more layers of appeal. If this option is used the initial decision would presumably be summary in nature.

A different approach is to use a form of triage when cases first enter the system. Straightforward cases would be sent for summary adjudication. The more complex cases would bypass that initial step and go directly to a more in-depth review by a relatively experienced official. The question in any particular program area is whether the additional time and expense of the triage process in fact improves the system.

At the appeal level, one option is to create a multi-level appeal structure. The second is to use a single level of appeal. An advantage of a single level system is that there is less opportunity for an individual case to drag on than where there is a second level of appeal. If, however, a backlog of cases develops because of the large volume of cases (and limited resources or poor case management), it is possible for the majority of cases to take longer to reach finality than in a two level appeal scheme where the first level of appeal perhaps operates in a relatively quick or summary fashion.[245] In most multi-level appeal structures, the second level appeal tribunal usually exercises a higher degree of adjudicative and legal sophistication and with many fewer members than in the tribunal which hears the much more numerous first level appeals. A practical consequence is that there are likely to be fewer judicial reviews arising from a second level appeal board than from a single level appeal board which must hear a large number of cases each year.

In designing a review structure for a high volume program area, the following program area characteristics are of special interest:

- Complexity (factual and legal) of the cases
- Percentage of cases where the correct decision can be reached easily and does not require significant additional fact gathering or other consideration
- Characteristics of the users
    - Is this a program area where, for whatever reason, users are less likely to pursue a process to remedy an incorrect decision?[246] For example, an incorrect initial decision is less likely to lead to ultimate injustice in the case of a commercial property assessment than in the case of an elderly person suffering from ill health who applies

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245 Whether or not the first level of appeal operates in that fashion depends on how it was designed legislatively and how it is managed and resourced.

246 See Ison, *supra*, p. 23.

for a benefit under a government program: the commercial property owner is more likely to initiate an appeal process than is the elderly person.

- If cases have an adversarial element between private parties,[247] is there a power or resource imbalance between the parties? A power imbalance increasingly favours one side as the number of levels of review or appeal increase since the weaker party may run out of resources to continue the fight.

- Timeliness
  - If the vast majority of cases are resolved a timely fashion, how important is it if the system allows a small number of cases to take an excessive amount of time to reach completion?
- Probable number of judicial reviews

Summary

Rigid rules cannot be laid down about when multiple layers of internal review, multiple layers of appeal or both might be appropriate.

Perhaps more than in any other area of designing a review structure, design decisions must take into account a broad range of characteristics unique to the particular high volume program area.

Several general guidelines can nonetheless be stated. First, because of the disadvantages inherent in multiple layers of review or appeal (or both), they should be used only after the most careful assessment of all the relevant factors and how the issue of timeliness will be dealt with. They will rarely if ever be appropriate other than in a high volume program area. Secondly, two layers of appeal at the tribunal level may be appropriate in certain circumstances but problems of delay will occur if cases are not dealt with relatively expeditiously at the first level. Thirdly, a power of reconsideration by the first level appeal tribunal is problematic. Finally, two layers of internal review will rarely be appropriate.[248]

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247 For example, both employees and employers can appeal determinations made on a claim by an injured employee: *Workers Compensation Act*, R.S.B.C., c. 492, ss. 90 and 91.

248 Where two layers of internal review exist, there is a real possibility that the disadvantages of internal review will outweigh the advantages; see above at p. 35. See the discussion on this point in Australian Administrative Review Council's *Internal Review, supra*, at pp. 22-25and 67.

Appeals to Tribunal then to Court

A multi-level system consisting of an appeal to a tribunal followed by a right of appeal to court (usually only on a point of law) raises issues separate from those relevant to review schemes consisting of multiple layers of appeal to administrative tribunals. The primary issue is the extent of the need for court oversight of tribunals (including appeal tribunals) to ensure they do not commit errors of law or stray beyond the power given them by the legislature. A secondary issue is whether judicial review or a statutory right of appeal to court is the better method for obtaining the necessary judicial oversight.

The first question raises the difficult issue of how much freedom adjudicative tribunals should be accorded in reaching their decisions. The answer to this question requires consideration of the reasons why the administrative tribunal was created in the first place and the extent to which it makes sense to have a court second guess a decision of an expert tribunal to which the legislature has entrusted certain decisions. These matters were discussed above[249] and also in the separate background paper, *Standard of Review on Judicial Review or Appeal*, previously released by the Administrative Justice Project.[250]

In some respects, the answer represent a philosophical choice. In the United Kingdom and Australia, several reports have recommended a right of appeal to court on points of law from decisions of an appeal tribunal (or any other tribunal from which there is no further appeal within the administrative justice system).[251] The rationale is twofold: (i) the rule of law requires that courts be available to correct legal errors by tribunals, and (ii) appeal on a point of law is preferable to relying on judicial review. In Canada, however, there has not been as extensive support for court review. For example, in British Columbia, there is no right of appeal to court from most of the tribunals with appellate jurisdiction. In addition, a significant minority of administrative tribunals have privative clauses limiting the availability of judicial review.

Whatever one's answer to how much judicial oversight is appropriate, a fact which must be considered is that, in the absence of a right of appeal to court, judicial review will in any event be available to deal with the most egregious legal errors by an appeal tribunal. But which is the preferred option for obtaining court review for legal errors: appeal or judicial review? As noted

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249 See the discussion about choosing between an appeal to a tribunal versus a court and also under the heading "Standard of Review".

250 *Supra*.

251 Franks Committee Report, *supra*, para. 107; Leggatt Report, para. 6.12 and 6.30. In the case of Australia, the recommendation is in fact for use of a statutory form of judicial review. For statutory

above, a statutory appeal to court on a point of law is preferable to relying on judicial review, where it is in the public interest that the review mechanism be as accessible as possible for members of the public.[252]

Apart from accessibility, another factor favouring creating a right of appeal to court rather than relying on judicial review is that restrictions can readily be placed on subsequent levels of appeal within the court system.[253] As indicated in the flow chart in Appendix B, there is an automatic right of appeal to the Court of Appeal from a judicial review decision in the British Columbia Supreme Court. There is then a right to apply to the Supreme Court of Canada for leave to appeal to that court. For those cases where allowing the normal appeal process to occur would detract from achieving the overall goals for the review structure, using a statutory right of appeal to the Supreme Court of British Columbia is preferable to relying on judicial review since it is possible to limit the number of subsequent appeals to the Court of Appeal.

Whether there should be a right of appeal to court on points of law from decisions of an appeal tribunal depends primarily on an assessment of the appropriateness of maximizing public access to court review of decisions by the appeal tribunal. That assessment should take into account the particular characteristics of the program area including matters such as the legal complexity of the issues.

10 NON-STATUTORY MATTERS

This paper has focussed on designing a structure for reviewing original decisions. It has dealt with issues relevant to the legislative framework for a review process. But there is also a range of other matters which need to be addressed in order to flesh out the legislative framework for the process. For the most part, these matters will not be reflected in the legislative framework but can be critical in determining whether the process will work successfully.

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and constitutional reasons, judicial review by the Australian Federal Court is broader in scope than a statutory appeal and covers all errors of law; see the references cited above at footnote 119.

252 See above at p. 40.

253 See the discussion above under the heading "Single Level or Appeal to Court?", p. 50. In theory, the legislature could presumably remove the right of appeal to the Court of Appeal from certain judicial review decisions by the British Columbia Supreme Court; such a move would, however, be likely be viewed as extraordinary.

These non-design matters are beyond the scope of this paper; however, a brief and non-exhaustive list includes the following:

- quality and skills of members appointed to appeal tribunals[254]
- provision of adequate staff and financial resources for the review process
- training for ministry and other staff
- procedures for notifying individuals of their right to apply for internal review or appeal and informing them about how the process will work
- case management practices by tribunals
- mechanisms to enable original decision makers to benefit from the decisions made on internal review, appeal or judicial review.

In addition to these matters relevant to the review process itself, actions taken at the level of the original decision can have a profound effect on the overall operation of the scheme for administering a particular program area. Good quality original decisions reduce the frequency with which individuals resort to a review process.[255] Officials making decisions should be accessible and courteous; the decision making process should be open and transparent. Good public administration includes treating individuals fairly and with respect. There is also the fact that, even when a person is disappointed by a decision, he is less likely to pursue review options if he feels that he was both heard and treated with respect.

11 CONCLUSION

Designing a structure for reviewing original decisions requires an understanding of a broad range of policy, practical and legal factors. No review mechanism works best in all circumstances. Much depends on a range of factors which vary from program area to program area.

The five steps outlined above help ensure that all relevant factors are taken into account by providing a structure for the design process:

Step 1: Identify the policy goals for the proposed review structure.

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254 The issue of appointments is dealt with in a separate Background Paper of the Administrative Justice Project.

255 It may be appropriate in some cases for an official to consult with an individual prior to reaching a final decision; see the discussion above at page 43.

Step 2: Identify those individual characteristics of the system under review which are relevant to the review structure.

Step 3: Take into account three general principles: achieve legislative clarity wherever possible, avoid unnecessary diversity and seek proportionality among different review mechanisms.

Step 4: Make the macro-structural choice of process between internal review, appeal or reliance solely on judicial review (or a combination of internal review and appeal).

Step 5: Make micro-structural decisions on technical matters relevant to the broad type of review selected in step four.

A large number of sometimes technical decisions must be made in designing a review structure or altering an existing one. Many of these decisions require balancing a variety of policy, legal and practical matters. In most cases, this requires the collegial work of several individuals each bringing their own particular background to the process.

APPENDIX A:
EXISTING STATUTORY APPEALS FROM TRIBUNALS

Statutory Appeals from Tribunals – Appellate Body

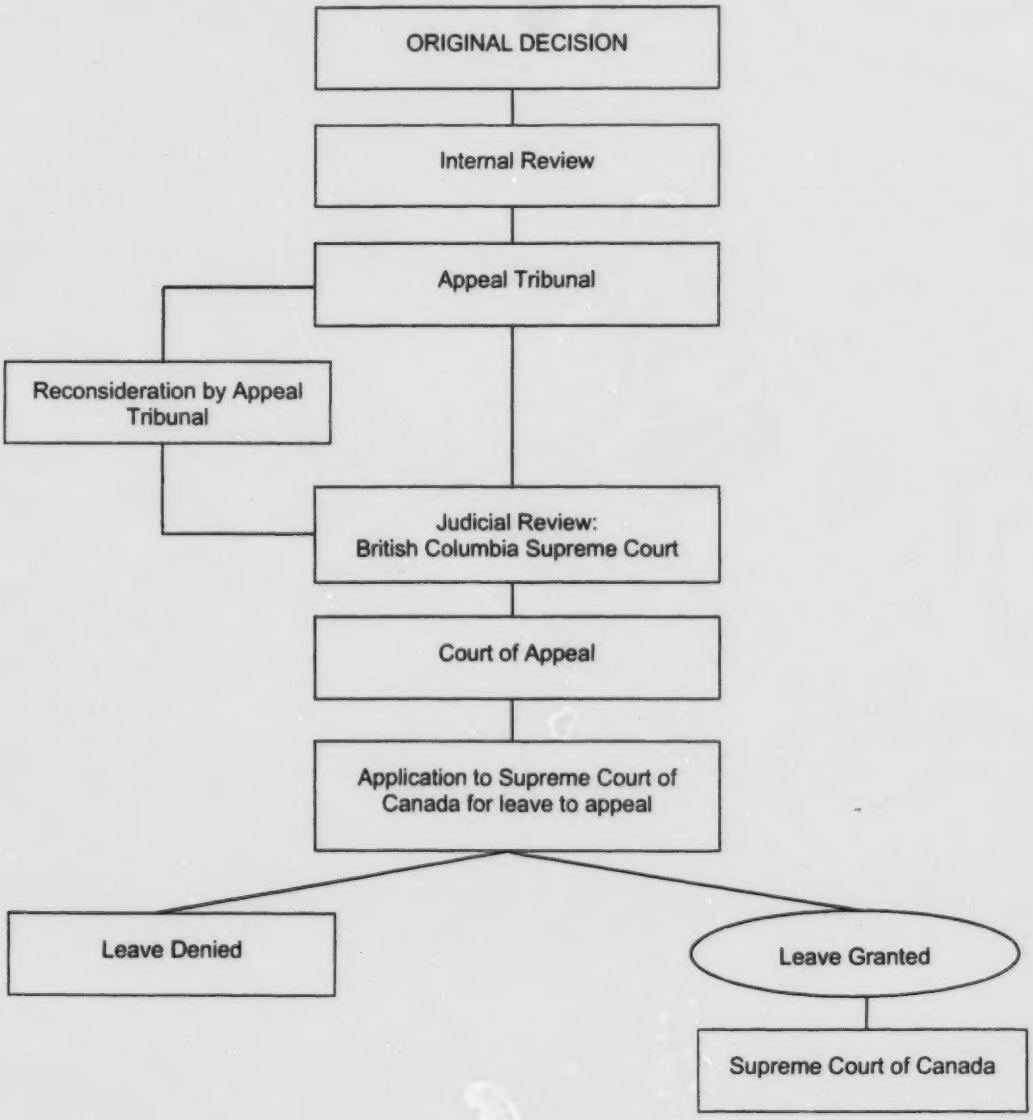
Nature of Appellate Body	Tribunals from which appeal originates
To another tribunal	BC Benefits Tribunal
	British Columbia Broiler Hatching Egg Commission
	British Columbia Chicken Marketing Board
	British Columbia Cranberry Marketing Board
	British Columbia Egg Marketing Board
	British Columbia Grape Marketing Board
	British Columbia Hog Marketing Board
	British Columbia Milk Marketing Board
	British Columbia Mushroom Marketing Board
	British Columbia Tree Fruit Marketing Board
	British Columbia Turkey Marketing Board
	British Columbia Vegetable Marketing Commission
	Criminal Record Review Adjudicators
	Financial Institutions Commission
	Labour Relations Board – Labour Arbitration Boards
	Medical Services Commission
	Property Assessment Review Panel
	Workers' Compensation Board
	Workers' Compensation Board – Appeal Division
	Workers' Compensation Board – Criminal Injuries Section
	Workers' Compensation Board – Review Board
To BC Supreme Court	British Columbia Marketing Board
	Coroner's Office
	Farm Practices Board
	Fire Commissioner
	Forest Appeals Commission
	Health Care and Care Facility Review Board
	Land Reserve Commission
	Medical Services Commission
	Medical Services Commission – Health Care Practitioners Special Committee for Audit
	Mineral Tax Review Board
	Property Assessment Appeal Board

To Court of Appeal	Commercial Appeals Commission Expropriation Compensation Board Labour Relations Board – Labour Arbitration Boards Motor Carrier Commission Racing Commission Securities Commission Utilities Commission

Notes: This table deals only with appeals from tribunals. It does not include appeals from other government decision makers. The information in this table is based on legislation in force as of December 31, 2001.

APPENDIX B:
FLOW CHART

This chart illustrates a multi-level review scheme consisting of internal review of the original decision coupled with appeal to a tribunal with a power of reconsideration. Since judicial review is always a possibility, it is included on the chart in the appropriate location.



Standard of Review on Judicial Review or Appeal

A Background Paper

Prepared by

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for

Administrative Justice Project

Ministry of Attorney General

Victoria, British Columbia

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Preface

This background paper is one of several to be released as part of the Administrative Justice Project. The Project, initiated by the Attorney General, is a broad legal and policy review of the system of administrative justice in British Columbia. Its objectives are to ensure that:

- administrative agencies meet the needs of the people they serve;
- their administrative processes are open and transparent;
- their mandates are modern and relevant;
- government fulfills its obligations by providing the legislative and policy framework administrative agencies require to carry out their independent mandates effectively.

The Terms of Reference for the background papers are to ensure that:

- legislation is based, to the greatest extent possible, on a principled, consistent and clear articulation of the role and powers of administrative agencies;
- administrative agencies possess the procedural authority to respond flexibly, effectively and efficiently to resolve disputes by adjudicative or other means;
- compelling rationales exist for more than one "layer" of administrative appeal or review;
- courts and parties have clearer direction regarding the legislature's intention concerning matters such as the standard of review where a decision is challenged on judicial review or appeals.

The intent of this and the other background papers is to facilitate informed discussion about steps government can take to assist the work of administrative agencies. The papers provide a focus for this discussion and, it is hoped, will result in dialogue and debate within the administrative justice community. Comment will be taken into account by the Administrative Justice Project when it drafts a White Paper for release in early 2002. There will be a further opportunity for public input after the White Paper is released, before government decides on what steps it will take.

The author of this paper wishes to recognize the capable editorial assistance provided by Mr. Robin Junger. Responsibility for any errors or omissions of course lies solely with the author.

If the reader is interested, written comments may be forwarded to the author at the following address prior to March 15, 2002.

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EXECUTIVE SUMMARY

British Columbians affected by the decisions of administrative tribunals have the right to apply to challenge those decisions in court. Such challenges usually arise in one of two ways. A person may exercise the constitutional right of judicial review in Supreme Court. Alternatively, a statute may give a person a specific right to appeal the tribunal's decision to a provincial superior court. Each method of challenging an administrative tribunal's decision has the same purpose: to convince a court that it should intervene on the basis of an "error" made by the tribunal.

The moment that an allegation of tribunal error is made in court, the court must come to grips what the law describes as the proper standard of review from the tribunal's decision. The inquiry into the proper standard of review on judicial review or appeal requires the court to ask itself this very fundamental question: "what is the court's proper role in reviewing the tribunal's decision, based on the error that has been alleged?" There are, broadly speaking, two possible answers to this question, giving rise to a judicial choice that may make a very significant difference to the outcome of the case before the court:

1. The tribunal's decision should be upheld only if the court agrees with it.

2. The tribunal's decision should receive deference from the court, and should not be interfered with unless the court concludes that it is unreasonable.

This discussion paper examines the law governing how courts on judicial review or appeal select the proper standard of review and apply that standard to the decisions of administrative tribunals. It confirms the widely shared observation that Canadian administrative law regarding the standard of review is very complex. After examining the Canadian law's complexity and its causes, this paper summarizes the administrative law of England and the United States regarding the standard of review. Following this comparative review, the final section of this paper asks readers to consider whether and how comprehensive legislative reform on this important subject might be achieved in the interests of greater certainty and economy.

Four key law reform themes emerge from this paper. The first is that the "pragmatic and functional" approach that courts presently apply in selecting the proper standard of review from the merits of tribunal decisions carries significant conceptual and practical difficulties. These difficulties tend to cause confusion, expense, inconsistency and uncertainty for parties and courts, especially where legislation is silent or ambiguous about the proper standard of review. Second, while two potential outcomes of the pragmatic and functional approach – i.e., the "correctness"

test and "patently unreasonable" test - offer relatively clear review standards, legitimate questions arise about how desirable it is for courts devote extensive analytical effort seeking to define and apply "intermediate" standards of review given the realities of judicial decision-making.

Third, and consistent with the Supreme Court of Canada's repeated emphasis that "legislative intent" is the central issue in selecting the proper standard of review, legislators have significant room to express their intention regarding the proper standard of review more often, more clearly, and more creatively than they do now. Fourth, while law reform, and especially attempts to legislate deference, will not eliminate the complication arising from the constitutional principle that tribunals cannot be totally immunized from judicial review, the law is generally simpler and easier to apply where legislation is clear – as for example, where it includes a full privative clause on one hand, or invites correctness review on legal questions on the other.

To determine whether law reform in this area is a worthy undertaking, it is necessary to consider the possibilities for reform. Should the legislature generally favour curial deference on all questions, or should it legislate "correctness" review on legal questions? Should it take one general approach on appeal, and another on judicial review? Should legislators be even more specific and legislate, on a tribunal-by-tribunal basis, different standards of review for different types of questions? Does the attempt to legislate the standard of review risk undesirable simplification, or the substitution of one set of analytical problems for another?

As this paper will show, the proper standard of review from administrative tribunal decisions, particularly with regard to questions of law, has been a hotly debated topic both inside and outside the courtroom. It raises fundamental questions about the proper balance between finality and accountability in tribunal decision-making and about the proper institutional relationship between administrative tribunals and courts.

This paper does not propose specific recommendations. It does, however, outline a set of reform alternatives with a view to eliciting discussion and debate by interested persons about the desirability and content of possible law reform. Persons and organizations commenting on this paper are invited to direct their comments to the Administrative Justice Project. These comments will be taken into account by the Project in preparing a White Paper setting out specific proposals and recommendations for government consideration.

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"Administrative law is not for sissies"[1]

Hon. Antonin Scalia, United States Supreme Court

1 OVERVIEW

The degree of complexity in the Canadian law regarding the standard of review is such that readers not fully acquainted with the jurisprudence may risk losing sight of "forest for trees". It will therefore be useful to begin by orienting the reader to the subject of administrative law, and to the context in which the "standard of review" issue discussed in this paper arises.

The body of law that we call "administrative law" is concerned with the legal principles governing persons and bodies exercising "governmental" or "public" power in relation to the citizen. This power is exercised primarily pursuant to legislation, the work product of the democratic process.[2]

Over the past five decades, administrative law has assumed much greater prominence in Canada. Its increased prominence is the by-product of the expanding role that government itself has played in Western countries following the Second World War. The following passage from a Supreme Court of Canada judgment nicely emphasizes the ubiquitousness of regulation in modern society:

> *It is difficult to think of an aspect of our lives that is not regulated for our benefit and for the protection of society as a whole. From cradle to grave, we are protected by regulations; they apply to the doctors attending our entry to the world and to the morticians present at our departure. Every day, from waking to sleeping, we profit from regulatory measures which we often take for granted. On rising, we use various forms of energy whose safe distribution and use are governed by regulation. The trains, buses and other vehicles that get us to work are regulated for our safety. The food we eat and beverages we drink are subject to regulation for the protection of our health.*[3]

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1 Hon. Antonin Scalia "Judicial Deference to Administrative Interpretations of Law" (1989) Duke L. J. 511 at p. 511.

2 I say "primarily" concerned, because the vast majority of administrative law cases concern persons exercising a statutory power. While this is a useful definition for purposes of this paper, it should be noted that the province of administrative law extends beyond persons exercising statutory powers, to officials such as ministers exercising common law "public" functions, and even private bodies acting without legislative underpinning but regarded as making a "public" decision: see *R. v. Panel on Take-overs and Mergers*, [1987] 1 Q.B. 815 (C.A.). For an extremely useful discussion of the outer boundaries of administrative law, see Groberman, "Administrative Law and Non-Statutory Bodies", *Administrative Law (1998)*, Continuing Legal Education, ch. 6.1.

3 *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at para. 136, per Cory J.

Regulation, and the use of public power it entails, has many faces. Public power is exercised by courts of law. It is exercised by ministers of the Crown and by officials within their ministries. It is exercised by local governments. It is exercised by self-regulatory bodies.

While the province of administrative law extends to all these bodies, this paper's attention focuses specifically on a group of entities that are neither ministers of the Crown nor courts; neither local governments nor Crown ministry officials. They are entities that are variously described as "independent administrative agencies", "administrative boards" and "administrative tribunals".[4] The Administrative Justice Project refers to them as "administrative justice agencies", and describes them as follows:

> *Administrative justice agencies provide specialized forums for decision making and dispute resolution that are separate from day-to-day operations of government ministries. Like the courts, administrative agencies are expected to be impartial and fair. As an alternative to the courts, they are also expected to be more accessible, less costly and more able to reach a decision in a timely and effective manner.*[5]

Administrative tribunals have been defined as "distinctive institutions of the welfare state" that typically share four characteristics:

- They enjoy a measure of independence from the government department with overall responsibility for the policy area in which they operate. This means, at the very least, that the minister cannot direct their decision-making, and in turn is not politically accountable for their decisions under traditional principles of "responsible government".
- They are specialized: they are associated with one or more specific public programs, usually within a single statute.
- They are meant to be effective and typically operate at the "sharp end" of the administrative process: that is, at the point where the program is applied to the individual.

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4 The "administrative tribunals" of particular concern in this paper are those tribunals that are part of the government's administrative justice project review, which are primarily "independent administrative tribunals": Terms of Reference, Schedules 1 and 2. This said, it is recognized that many of the matters discussed in this paper may have application to reform prospects for other legislative delegates, including Crown decision-makers, self-governing professions and local governments. While this paper may provide a helpful framework for the reforming the law regarding the standard of review in those areas, each of them raise unique policy considerations that may, for some, speak in favour of a different answer to the law reform questions posed in this paper.

5 Administrative Justice Project, *Terms of Reference*, July 27, 2001.

- Their functions typically include making decisions that are sufficiently serious and specific in relation to the citizen as to attract the common law duty of procedural fairness.[6]

The public policy areas served by administrative tribunals are nearly as broad as those of government itself. As the Supreme Court of Canada has recognized: "In Canada, boards are a way of life. Boards and the functions they fulfill are legion."[7]

For the great breadth of modern administrative law, its roots run just as deep. Administrative law is the inevitable by-product of the Rule of Law, and two transcendent ideals it encompasses: (1) that those exercising public authority must act, and must be allowed to act, within the scope of their grant of authority; and (2) that where public power is directed toward the citizen, decision-makers must generally act in a fashion that is procedurally fair. These ideals are not judicial inventions. They are not matters only for lawyers. They represent a fundamental societal ethic. This is why the articulation, realization and reconciliation of these ideals have spawned significant debate both inside and outside the courtroom.[8]

Nowhere do the tensions inherent in giving meaning to the "rule of law" come into sharper focus than in real life cases where parties prevail upon courts to interfere with decisions rendered by administrative tribunals. The vast majority of court challenges to administrative tribunal decisions arise on judicial review and statutory appeal. For a petitioner or an appellant in such a proceeding, the argument will be made that the tribunal has rendered a decision tainted by some sort of "error" that demands correction by the court.

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6 See generally, Evans, Janisch, Mullan and Risk, *Administrative Law* (4th ed, 1995), pp. 12-20.

7 *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at para. 17.

8 For a useful summary of the competing tensions in this area, see Chief Justice McLachlin's Paper: "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999), 12 C.J.A.L.P. 171. The ongoing debate about how "the Rule of Law" should be defined and articulated might cause some readers to wonder whether it really is a notion worthy of being called a "fundamental societal ethic". To this legitimate question, one might respond first with the insight of Lord Reid, whose comments about the notion of "natural justice" apply equally well to the Rule of Law: "In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist": *Ridge v. Baldwin*, [1963] 2 All E.R. 66, Lord Reid at p. 71. In addition, it may be suggested that the Rule of Law is probably subject to such intense discussion precisely because its "primary colours" are fundamental and well-established; the debate is usually around the importance of each colour, what kind of picture to paint, and how to paint it.

The moment an allegation of tribunal error is made in court, the "standard of review" question arises for the court. It is a question that the court must ask itself – a question that may be stated with deceptive simplicity: "What is my role here?"

The law regarding the standard of review may be thought of as a very elaborate answer to that very simple question. In considering the law, and the options for law reform discussed below, this paper seeks to ask the following questions:

- Why does the inquiry into the standard of review arise at all?
- What is the law in Canada regarding how courts should determine and apply the standard of review regarding administrative tribunal decisions?
- Is the present state of the law sufficiently certain, workable and predictable?
- What are the underlying principles and competing tensions that inform the law?
- To what extent do the court decisions actually respect the intention of the Legislature regarding the standard of review, and what are the implications of this for law reform?
- Can we learn anything from how English and American courts address this problem?
- To what extent do different standards of review actually affect oversight decisions of tribunals by courts in real life cases?
- Should the law be reformed, and if so what reform options are available?
- If reform is appropriate, how should British Columbia legislators answer the policy question whether or to what extent courts ought to grant deference to questions of law decided by administrative tribunals?

2 THE STANDARD OF REVIEW

At its root, the inquiry into the standard of review in Canadian administrative law is about determining the threshold for "error" about which a court on judicial review or statutory appeal must be satisfied before it may quash or reverse an administrative tribunal's decision.

While the standard of review issue necessarily arises whenever a court is asked to review a tribunal decision, the specific focus of this paper is on the standard of review as it applies to the branch of law concerned with alleged *substantive* error by tribunals: what have been called errors

of "fact", "law" and "discretion". Procedural fairness questions give rise to their own method of analysis, which from a "standard of review" perspective, is more straightforward.[9]

Canadian administrative law has grown to recognize a series of "standards of review" for alleged substantive error by administrative tribunals, each of which articulates a different degree of judicial tolerance for that which the court might regard as "error" on the part of the administrative tribunal. The most deferential standard of review is the "patently unreasonable" test, pursuant to which only a "clearly irrational" decision may be disturbed by the court.[10] The least deferential standard is the "correctness" standard, which entitles the court to disturb a tribunal's decision based merely on disagreement with the tribunal.[11] The "reasonableness *simpliciter*" test has been announced as an "intermediate" standard of review, that entitles a court to disturb an administrative tribunal's decision if it is "clearly wrong".[12] Each of these "standards of review" will be described further below.

The need to determine and apply the proper standard of review is inescapable in any legal system charging one decision-maker with the responsibility of reviewing the decisions of another

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9 As this paper will show, the greatest complexity in the law regarding the standard of review flows from the difficulties in applying the "pragmatic and functional approach" to alleged *substantive* errors by administrative tribunals. The "pragmatic and functional approach" has not, to date, been applied to alleged errors of procedural fairness. This is principally because procedural fairness questions have been defined as being "jurisdictional" in nature, and because no one seriously questions the Courts' historic role to ensure that tribunals accord citizens due process. This does not mean that courts will not give some leeway to tribunals in defining what is fair in the circumstances. In this sense, there is room for discussion about "deference" to tribunal procedures. However, both courts and scholars have implicitly recognized that the "pragmatic and functional" approach was never designed for that discussion. See for example *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, where the Court clearly distinguished between the principles applicable to the "procedural fairness" and "abuse of discretion" aspects of the case. The matter may have been summarized best by Jones and de Villars, *Principles of Administrative Law* (1999, 3rd ed), at pp. 513-14: "Neither the 'correctness' test nor the 'patently unreasonable' test really fits this ground of judicial review... Perhaps the better way to look at this question is to articulate a separate test for judicial review of alleged breaches of natural justice: namely, would a reasonable person, reasonably knowledgeable about the facts, reasonably perceive the process to be unfair?.... The language of natural justice is simply different from the language of 'correctness' or 'reasonableness' or any points between. This implies that there is a different dimension applicable to this ground of review".

10 *Canada (Attorney General) v. Public Service Alliance of Canada* (1993), 101 D.L.R. (4th) 673 (S.C.C.) at p. 690.

11 *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890.

12 *Canada (Director of Investigation and Research) v. Southam* (1997), 144 D.L.R. (4th) 1 (S.C.C.) at pp. 19-22.

decision-maker. Whenever an administrative tribunal's decision is challenged in court on judicial review or statutory appeal, the court must explicitly or implicitly ask itself these sorts of fundamental questions about its proper role in scrutinizing the challenged decision in light of the error alleged:

- Is it the court's job to step into the tribunal's shoes and uphold the decision only if the court "agrees" with decision, or would the court be overstepping its proper role to ask what decision it would have made in place of the tribunal?
- Should the court "defer" to the tribunal's decision even if the court might have come to a different conclusion?
- If the judicial deference is appropriate, what are the "tolerance limits" for such deference before judicial intervention is justified?

On judicial review and statutory appeals to courts, lawyers spend a great deal of their client's money, and the court's time, addressing the standard of review. They do so because they understand that decisions identified as being entitled to significant curial deference are generally at lower risk of being disturbed than decisions to which the court finds that no deference is owed. The answer to the standard of review question may therefore make a very significant difference to the outcome of litigation.

3 WHY DOES THE INQUIRY INTO THE STANDARD OF REVIEW ARISE AT ALL?

Parties who take issue with the decisions of administrative tribunals are sometimes surprised to learn that courts even hesitate to determine whether the challenged decision was "correct". After all, courts are courts. Administrative tribunals are not.[13] And so the client may ask legal counsel: "Isn't it the job of the courts to make sure that administrative tribunals do not make mistakes"?

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13 As a matter of function, the dividing line between courts and administrative tribunals is, of course, not as sharp as it is sometimes made out to be, particularly in the cases of adjudicative tribunals, some of which even deal with constitutionally protected interests. This said, the Supreme Court of Canada has recently confirmed that, as a matter of institutional characterization, administrative tribunals are not properly regarded as part of the judiciary: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at para. 24: "Administrative tribunals [in contrast to superior and provincial courts] lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it

Legal counsel who has been asked this very natural and simple question is in the business of what Oliver Wendell Holmes described as "the prediction of the incidence of the public force through the instrumentality of the courts"[14]. The lawyer's prediction about when the "instrumentality of the courts" will intervene to disturb the administrative tribunal's decision need not be perfectly certain. To return to Holmes again: "certainty generally is illusion, and repose is not the destiny of man".[15] And yet if law is not to become a wholly arbitrary and cynical exercise in which there is never repose, the lawyer should be able to offer the client a principled and useful risk prediction upon which the client can decide whether to expend the financial and emotional resources attendant on litigation. The inability to provide a principled and useful prediction for the client at all, or without great time and cost being incurred, becomes an adverse reflection either on the lawyer, or on the law itself.

Appeal courts, trial judges and the standard of review

The diligent lawyer advising such a client may begin by noting that the proper standard of review to be used by a "higher" decision-maker on review of the decision of a "lower" decision-maker is not an issue confined to administrative law. Determining the standard of review is a fundamental, threshold question in any circumstance where one decision-maker is charged with reviewing the decisions of another. Whether or not the legislature has clearly spoken to the matter, the issue must be confronted by the reviewing body.

The point can be illustrated by examining the role that appellate courts play in hearing appeals from decisions of trial judges. The British Columbia Court of Appeal derives its authority from the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, which on its face grants the Court of Appeal very broad powers in civil appeals.[16] Notwithstanding the apparent breadth of sections 6 and 9 of the *Court of Appeal Act*, the courts themselves have, as a matter of judicial policy, characterized the

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is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract *Charter* requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected."

14 Holmes, "The Path of the Law" (1897) 10 Harv. L. Rev. 457 at p. 457.

15 *Ibid*, p. 466.

16 By combination of ss. 6 and 9 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, there is no limit on the issues that may be appealed, or the remedies the Court of Appeal may grant. It has the power to "draw inferences of fact" (s. 9(2)) and may "exercise any original jurisdiction that may be necessary or incidental to the hearing or determination of the appeal": s. 9(3). The *Act* contains no legislative statement of deference to findings of fact or exercises of discretion. Such constraints are the product of judicial policy.

proper appellate role in reviewing decisions of trial judges in civil cases as being "narrow": *Van de Perre v. Edwards*, [2001] S.C.J. No. 60 at para. 11.

All lawyers know, of course, that the primary function of courts of appeal in criminal and civil cases is to ensure that trial judges correctly state and apply the law. For a court of appeal to tolerate "error" by trial judges on legal questions would defeat the purpose of creating a court whose job it is to pronounce upon the general law with authority and finality. Thus, on questions of law, trial courts receive no deference from courts of appeal; the standard of review is "correctness". Where, however, the appeal is from a finding of fact or the exercise of discretion by a trial judge, matters are not so straightforward.

On questions of fact, appellate courts apply a "deferential" standard of review from the findings of trial judges. As concisely stated in *Tremblay v. MacLauchlan*, [2001] B.C.J. No. 1403 (Q.L.) at para. 13:

> *This being in part an appeal against the learned trial judge's assessment of the evidence, it is, perhaps, useful to state the obvious: the standard of review on issues of law is correctness; on findings of fact this Court may only interfere with the trial judge's conclusions if there is shown to be a palpable or overriding error, that is, the trial judge has made a manifest error, has ignored conclusive or relevant evidence, has misunderstood the evidence or has drawn erroneous conclusions from it: Stein v. The "Kathy K", [1976] 2 S.C.R. 802; Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [1994] 1 S.C.R. 114.*[17]

Appellate deference to a trial court's findings of fact does not require a privative clause. In our system of law, the trial judge or jury is assigned the role of trier of fact. The trier of fact sees the witnesses and hears the evidence. The Court of Appeal does not, except in exceptional cases, receive direct evidence. As a matter of institutional purpose and design, the Court of Appeal is not in a position to apply a "correctness" test to factual findings based on *viva voce* evidence. Nor do the interests of finality make it desirable to design a judicial appellate process designed to "replay" the fact-finding exercise over again.[18]

Respect for the special role and structure of each court, and the interests in finality, are evident even in cases where, for example, "credibility" is not in issue. Thus, appellate deference is

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17 See also *Brimacombe v. Mathews*, [2001] B.C.J. No. 538 (C.A.) at para. 236: "The finding of facts and the drawing of conclusions from those facts is primarily the province of the trial judge, not that of the Court of Appeal".

18 This is of course in contrast to administrative appeal tribunals, whose very design and purpose is frequently to conduct rehearings or hearings *de novo* from the decisions of first instance decision-makers: see generally Evans, Janisch, Mullan and Risk, *Administrative Law* (4th ed), p. 609.

accorded to a lower court's findings of fact even where the lower court's findings, and the inferences drawn from them, are based on affidavit evidence, or on credible but conflicting expert testimony. In the latter instance, the "principle of non-intervention" does not apply with the same force, but this does not "change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact....": *Toneguzzo-Norvell v. Burnaby Hospital*, [1994] 1 S.C.R. 114 at p. 122. As to the former, it is open to the Court of Appeal to draw all reasonable inferences from affidavit evidence submitted at first instance, but "this Court will not interfere with the findings of a chambers judge unless they are shown to be clearly wrong, or could not reasonably be supported by the evidence": *Coast Wire Rope & Supply Ltd. (Trustee of) v. Trans Pacific Hardwarre Inc.*, [1999] B.C.J. No. 748 (C.A.) at para. 11.

The exercise of discretion by trial judges is also entitled to deference by Courts of Appeal. In *Co. Ce. Fin (Receiver of) v. Yorkton Securities Inc.*, [1999] B.C.J. No. 2978 (C.A.), at para 16, the standard of review was stated as follows:

> *This Court will not substitute its discretion for the discretion already exercised by a chambers judge unless it reaches the clear conclusion that the discretion has been wrongly exercised in that no sufficient weight has been given to relevant considerations or that it appears that the decision may result in an injustice.*

Even in custody cases, where the best interests of a child are at stake, the standard of review is deferential. In *Van de Perre v. Edwards*, [2001] S.C.J. No. 60 at paras. 13-15, the Supreme Court of Canada held as follows:

> *It is clear from this case that it is necessary for this Court to state explicitly that the scope of appellate review does not change because of the type of case on appeal....*
>
> *[T]he approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial... [A]n omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.*

Nor are questions about the standard of review confined to civil appeals. Consider section 687(1) of the *Criminal Code*, which specifically authorizes Courts of Appeal to consider the fitness of a

criminal sentence and, in that context, to vary the sentence within the limits prescribed by law.[19] On its face, this section appears to authorize Courts of Appeal to engage in a reasonably exacting assessment of the correctness of the sentencing judge's decision. However, in *R. v. MacDonnell*, [1997] 1 S.C.R. 948,[20] the Supreme Court of Canada specifically rejected such an approach to sentencing appeals:

> *... the sentencing judge has had the benefit of presiding over the trial of the offender [and] will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both Shropshire and this instance), the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community....*
>
> *[A] court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.*

The situations described above demonstrate that even in the context of appeals to judges from the decisions of other judges – and despite legislative language that may appear to invite a broad appellate role – appeal courts have found it necessary to address and define the standard of review. In doing so, the courts have managed to articulate a relatively clear set of judicially created "standard of review" principles. These principles preserve the Court of Appeal's specialized role in ensuring that trial judges correctly state the law, while giving appellate deference to trial judges on fact-finding, and the exercise of discretion. Appellate deference is granted in these latter areas in recognition of the advantages of trial courts in hearing witnesses, but also in recognition of the specialized role of trial courts and the interests of finality in litigation.

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19 Section 687 of the Criminal Code provides as follows: "687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive, (*a*) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or (*b*) dismiss the appeal."

20 Quoting *R. v. Shropshire*, [1995] 4 S.C.R. 227.

That appellate justices may differ in the application of these principles is not necessarily an indictment of the principles themselves. As with any set of general principles applied by human beings to an infinite variety of fact situations, there will always be room for argument about their application in individual instances. The fundamental point is that the "standard of review" principles applicable to appellate review of courts, by courts, are well-established, accessible and reasonably predictable.

In contrast to the situation that prevails in Canadian administrative law, the appellate jurisprudence does not – apart from the leading cases - disclose that parties and courts are spending an inordinate amount of time in each appeal labouring over the threshold question of the proper standard of review of trial courts. In general, the standard of review is clear, and as a result, the Appeal Court, and the parties, can get on with business.

4 WHAT IS THE PRESENT LAW IN CANADA REGARDING THE STANDARD OF REVIEW OF THE MERITS OF TRIBUNAL DECISIONS?

Determining the appropriate standard of review is conceptually necessary because review cannot be undertaken until the reviewing body properly identifies its role. It is practically necessary because the outcome of litigation may be significantly affected by the standard of review applied. The fundamental importance of the issue would, ideally, commend as clear a statement as possible in Canadian law regarding how to ascertain and apply the proper standard of review.

And yet it is undeniably true that the law governing the standard of review of administrative tribunals by courts on judicial review and appeal is very complex - much more complex than the law governing the standard of review of trial courts by appellate courts.

Over the past twenty years, the administrative law bar has witnessed numerous attempts by the Supreme Court of Canada to synthesize, and re-synthesize, a set of principles to help lower courts determine and apply the standard of review. These efforts have arisen in cases involving a wide variety of statutory provisions and legislative settings. They have involved fact patterns eliciting varying degrees of sympathy from individual judges. They have challenged the traditional supremacy of courts in assigning the "correct" legal construction to public statutes. And they have implicated fundamental questions as to the function and expertise of administrative tribunals, the proper supervisory role of the courts and the nature of "error" in legal reasoning.

Given the nature of these factors, to be discussed in further detail below, it should come as no surprise that the law governing the standard of review did not emerge neatly, simply and immediately. Whether the solution need be as complex as it has become in Canada is, however, another question. To appreciate the degree of complexity in which we find ourselves today, and the possibilities for legislative reform in this area, it will be useful to begin by summarizing the principles of orthodoxy as they relate to determining the appropriate standard of review in administrative law in Canada.

The general framework

In *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, the court referred to its 1998 judgment in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, as having "summarized the recent jurisprudence of the court on the standards of review to provide a framework for easy reference by judges and lawyers...."[21]

Pushpanathan holds that the central issue for a court of law in determining the proper standard of review of a question of fact, law or discretion is the legislative intent of the statute creating the tribunal whose decision is being reviewed. More specifically, the reviewing court must ask itself: "was the question which the provision raises one that was intended by the legislators to be left to the exclusive jurisdiction of the Board?"[22]

Courts are required to divine legislative intent on this question according to a "nuanced" approach, dubbed the "pragmatic and functional approach". This approach requires the court to weigh several factors, none of which is dispositive, and each of which provides an "indication" falling on a "spectrum" regarding the proper level of deference to be shown to the decision in question. The "spectrum" has a "more exacting end" and a "more deferential end"; it includes the standards of "correctness", "reasonableness *simpliciter*" and the "patently unreasonable" test.[23] The pragmatic and functional analysis must be applied to each particular provision being invoked and interpreted by the tribunal; some provisions within the same *Act* may require greater curial deference than others.[24]

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21 *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 at para. 17.

22 *Ibid*, para. 26.

23 *Ibid*, para. 27.

24 *Ibid*, para. 28.

There are four sets of factors to be taken into account in determining the proper standard of review for a particular decision:

- Privative clauses: The presence of a full privative clause is compelling evidence that the court ought to defer to the decision unless other factors strongly indicate the contrary as regards the particular determination in question. A "partial or equivocal privative clause" merely "fits into the overall process of evaluation of factors to determine the legislator's intended level of deference". A clause permitting appeals generally suggests a more searching standard of review, but this factor is not conclusive.25
- Relative expertise: This factor, described in Southam as "the most important of the factors that a court must consider in settling on the standard of review", requires the court to consider three factors: the expertise of the tribunal (in the sense of the specialized knowledge, special procedure, or non-judicial means of implementing the Act), the expertise of the court relative to that of the tribunal, and the specific issue before the tribunal relative to that expertise. Once a broad relative expertise on the part of the tribunal has been established, the court may show considerable deference even in cases of highly generalized statutory interpretation of the tribunal's enabling statute.26
- Purpose of the Act as a whole, and the provision in particular: courts are more likely to exercise restraint where a tribunal's purpose in general, and the specific decision under review, reflect the "polycentricity principle". Polycentric issues involve a large number of interlocking and interacting interests and considerations, and contrast with "judicial procedure" which is premised on the "bipolar opposition of parties". Decisions where this factor is prominent include sectors such as economic management. Polycentric issues also arise for tribunals that exercise a protective, proactive and policy development role, and which apply legal principles that are "open textured" or involve a "multi-factored balancing test". Polycentric statutes are conceived not as establishing rights and entitlements, but rather as a delicate balancing between different constituencies. In a "polycentric" dispute, the appropriateness of court supervision diminishes. 27
- Question of law or question of fact: Without an express or implied legislative intent to the contrary as manifested in the three criteria above, legislatures should be assumed to

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25 *Ibid*, paras. 30-31.

26 *Ibid*, paras. 32-34.

27 *Ibid*, para. 36.

have left highly generalized propositions of law to the courts. However:

- while there is merit in the distinction between fact and law, the distinction is not always clear;
- the "correct" interpretation of a term may be dictated by the board's mandate and its own coherent jurisprudence. In some cases even if courts do not agree, the integrity of certain administrative processes may demand that deference be shown; and
- even pure questions of law may be granted wide deference where other factors suggest such a legislative intent.

Where the court is hearing an appeal or judicial review from the exercise of discretion by an administrative tribunal, it must, in addition to the factors above, also consider "the amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made. The spectrum of standards of review can incorporate the principle that, in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament": *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 55.

Does the present law really give effect to legislative intent?

As noted above, the Supreme Court of Canada has repeatedly emphasized that the "central issue" in determining the standard of review is the intent of the legislator on the question. Since the focus of this paper is to examine options to help clarify legislative intent regarding the standard of review, it will be useful to more closely examine the law as it developed where legislatures have attempted to express their intent clearly: for example, by enacting full privative clauses on the one hand, and rights of appeal on the other.

Full privative clauses

A "full privative clause" is a provision, usually in the enabling statute, expressly declaring that the decisions of the administrative tribunal in question are "final and conclusive".[28] As a matter of

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28 *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* (1998), 160 D.L.R. (4th) 193 (S.C.C.) at p. 210: "A full privative clause is 'one that declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded'... Unless there is some contrary indication in the privative clause itself, actually using the words 'final and conclusive' is sufficient, but other words might suffice if equally explicit....".

plain meaning, full privative clauses purport to completely insulate the tribunal from any form of judicial review or appeal.[29] This, in fact, was the very purpose of many traditional full privative clauses which, particularly in British Columbia and Quebec, sought to rely on legislative supremacy to assert that the tribunal, not the court, ought to have the "last word" on all questions arising under the protected statute. An article of the era put the matter rather bluntly:

> *There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and who is well-aware of the effect upon the purpose of various alternate interpretations. There is no reason to believe that a legally trained judge is better qualified to determine the existence or sufficiency or appropriateness of evidence on a given point than a trained economist or engineer, an arbitrator selected by the parties, or simply an experienced tribunal member who decides such cases day in and day out. There is no reason to believe that a judge whose entire professional life has been spent dealing with disputes one by one should possess an aptitude for issues which arise often because an administrative system dealing with cases in volume has been designed to strike an appropriate balance between efficiency and effective rights of participation.*[30]

However, in *Crevier v. A.G. Quebec* (1981), 127 D.L.R. (3d) 1 (S.C.C.), the Supreme Court of Canada issued its landmark ruling that any clause purporting to totally immunize an administrative tribunal from judicial review would be inconsistent with s. 96 of the *Constitution Act, 1867*. The court held that full privative clauses, while effective in limiting judicial review, must be "read down" to recognize the inherent role of provincial superior courts in ensuring that a statutory delegate does not commit *jurisdictional error*:

> *There may be differences of opinion as to what are questions of jurisdiction but, in my lexicon, they rise above and are different from errors of law, whether involving statutory construction or evidentiary or other matters. It is now unquestioned that privative clauses may, when properly framed, effectively oust judicial review on questions of law and, indeed, on other issues not touching jurisdiction. However, given that s. 96 is in the British North America Act, 1867 and that it would make a mockery of it to treat it in non-functional terms as if it were a mere appointing power, I can think of nothing more the hallmark of a*

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29 Particularly in labour statutes, the "final and conclusive" language is taken even further. This provision, from s. 22(2) of the Saskatchewan *Workers' Compensation Act* under consideration in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, is typical: "The decision and finding of the board under this *Act* upon all questions of fact and law are final and conclusive and no proceedings by or before the board shall be restrained by injunction, prohibition or other proceeding or removable by *certiorari* or otherwise in any court."

30 Arthurs, "Protection Against Judicial Review" (1983), 43 R du B 277 at p. 289, cited in *National Corn Growers Assn v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, per Wilson J.

> *Superior Court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review.*[31]

For law reform purposes, it follows from *Crevier* that legislators do have substantial latitude to insulate tribunal decisions from judicial review. However, this latitude is subject to the constitutional limitation that such legislation may not oust the courts from determining "the limits of [a tribunal's] jurisdiction."

It has been observed that "thinking about jurisdiction [is like] attempting to extract oneself from fly-paper: once you get started with the exercise it is virtually impossible to break free".[32] As will be noted below, English courts have held that it is so pointless to try and distinguish between "jurisdictional" and "non-jurisdictional" questions that the only solution is to regard all questions of law as "jurisdictional".

The Supreme Court of Canada has, however, taken a different approach. It has held that "jurisdictional error" will be present with regard to legal questions when the administrative tribunal (a) incorrectly interprets a legislative provision "limiting the tribunal's powers"; or (b) is "patently unreasonable" in answering a question "within jurisdiction".[33] As stated by the Court in 1995:

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31 *Crevier*, at pp. 14-15 (D.L.R.). Only 3 years earlier, Dickson J. (as he then was) expressed the matter as follows in *Jacmain v. A.G.C.*, [1978] 2 S.C.R. 15 at p. 29: "The intractable difficulty is this. It is hard to believe that a legislature would create a tribunal with a limited jurisdiction and yet bestow upon such tribunal an unlimited power to determine the extent of its jurisdiction." The same principle was more recently captured by Le Bel J., for the Court, in *Noel v. Societe d'energie de la Baie James* (2001), 202 D.L.R. (4th) 1 (S.C.C.) at para. 27: "Under the constitutional arrangements that prevail in Canada, each province has a superior court whose members are appointed under s. 96 of the *Constitution Act, 1867*. That court is the cornerstone of the Canadian judicial system. It has what has been characterized as a "core" jurisdiction, which cannot be removed from it by the provincial legislatures. (See *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 at p. 740, 130 D.L.R. (4th) 385, Lamer C.J.C.) Among the essential powers reserved for a superior court, as a court of general jurisdiction, is the judicial review of lower tribunals and administrative bodies. While that power may be circumscribed, it cannot be totally removed from the Superior Court or transferred to another body. (See *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220 at p. 235, 127 D.L.R. (3d) 1; *Alliance des Professeurs Catholiques de Montréal v. Labour Relations Board of Quebec*, [1953] 2 S.C.R. 140 at p. 155, [1953] 4 D.L.R. 161; *Quebec (Attorney General) v. Farrah*, [1978] 2 S.C.R. 638, 86 D.L.R. (3d) 161; *Séminaire de Chicoutimi v. Chicoutimi (City)*, [1973] S.C.R. 681, 27 D.L.R. (3d) 356 sub nom. *Seminary of Chicoutimi v. Quebec (Attorney General)*.

32 Wade MacLauchlan, "Judicial Review of Administrative Interpretations of Law: How Much Formalism Can We Reasonably Bear?" (1986), 36 U of T L.J. 313 at footnote 3.

33 Pasiechnyk v. Saskatchewan (Workers' Compensation Board), [1997] 2 S.C.R. 890 at paras. 16-18: "If the conclusion is that a full privative clause applies, then the decision of the tribunal is only reviewable if it is patently unreasonable or the tribunal has made an

> *Generally speaking, where the tribunal whose decision is under review is protected by a privative clause, its decision is subject to review on a standard of patent unreasonableness. However, this is only true so long as the tribunal has not committed a jurisdictional error. Jurisdictional questions addressed by the tribunal are independently reviewed on a correctness standard. An error on such a jurisdictional question will result in the entire decision of a tribunal being set aside.*[34]

In *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, the court held that questions limiting a tribunal's jurisdiction are to be identified by focusing on legislative intent. That intent is to be gleaned using what, for the first time in Canadian administrative law, was described as a "pragmatic and functional analysis". As articulated by Beetz J., for the court, the "pragmatic and functional analysis" - which bears many striking similarities to the approach suggested by Professor Wade MacLauchlan in a 1986 law review article[35] - requires an examination of the following factors:

> *. . . not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.*

The "pragmatic and functional approach" thus did not originate as a general test applicable to judicial review and appeal. Rather, it was an effort to provide courts with a less "formalistic" method for identifying "jurisdictional" issues in their ongoing attempt to reconcile legislative efforts to completely insulate certain tribunals from judicial review with the courts' constitutional role as expressed in *Crevier*.

The Supreme Court of Canada's insistence that "legislative intent" is the touchstone for correctness review in the face of a full privative clause has been confusing for courts and

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error in the interpretation of a legislative provision limiting the tribunal's powers. In either circumstance the tribunal will have exceeded its jurisdiction. These principles are summarized in U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, at p. 1086: 'It is, I think, possible to summarize in two propositions the circumstances in which an administrative tribunal will exceed its jurisdiction because of error: 1 If the question of law at issue is within the tribunal's jurisdiction, it will only exceed its jurisdiction if it errs in a patently unreasonable manner; a tribunal which is competent to answer a question may make errors in so doing without being subject to judicial review; 2 If however the question at issue concerns a legislative provision limiting the tribunal's powers, a mere error will cause it to lose jurisdiction and subject the tribunal to judicial review.'" See also Canada (Director of Investigation and Research) v. Southam Inc. (1997), 144 D.L.R. (4th) 1 (S.C.C.) at p. 19, "[t]he standard of patent unreasonableness is principally a jurisdictional test".

34 Canadian Broadcasting Corp. v. Canada (Labour Relations Board), [1995] 1 S.C.R. 157 at p. 178.

legislators. As a matter of legislative intent, a full privative clause states the matter clearly and generally – the tribunal's decision is "final and conclusive" - there shall be no judicial review. As Mr. Justice Frankfurter once put it in the American context "One need not italicize 'final' to make final mean final".[36]

Where a court identifies a question as "jurisdictional" in the face of a full privative clause, it is in truth asserting a transcendent constitutional review role despite legislative intent. Such an assertion of judicial power is entirely legitimate, but it can create a frustrating "feedback loop" to tell parties and lower courts that the only way to identify a "jurisdictional" question in the face of a full privative clause is to search for an implicit or "secondary" legislative intent that directly contradicts the plain language of the privative clause. For his part, Professor Wade makes no bones about the fact, in England, judicial review in the face of a full privative clause is not the fulfillment of legislative intent, but plain and simple "disobedience to Parliament" - a disobedience of which he approves.[37]

Rather than create a test whose premise invites tail-chasing, or which seeks to attribute to the legislator a second but contradictory "legislative intent" that is "issue-specific",[38] it may be more straightforward simply return to *Crevier* and ask whether the question before the Court is so fundamental that it rises above a mere question of law, such that the tribunal's failure to answer it correctly would offend the Constitution. While one might well answer this question using some of the "factors" contained in the pragmatic and functional approach, the inquiry's premise would have greater validity, and would probably result in questions being identified as "jurisdictional" less frequently than is risked by the present test.

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35 MacLauchlan, note xxii, *supra*.

36 Quoted in Schwartz, "*Anisminic* and Activism: Preclusion Provisions in English Administrative Law" (1985) Admin. L.R. 33 at p. 39.

37 Wade, H.R.W., "Beyond the Law: A British Innovation in Judicial Review" (1991), 43 Admin. L. Rev. 559 at p. 564.

38 No decision of the Supreme Court of Canada has ever sought to explain how a test that purports to focus on legislative intent should be used as the litmus test to override the clear legislative intent expressed in the plain words of a privative clause. However, in a November 1, 1998 speech given by Chief Justice McLachlin to the British Columbia Council of Administrative Tribunals, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 C.J.A.L.P. 171 at pp. 176-78, the Chief Justice implied that the solution lies in understanding that there are "two intentions" at work – one expressed in the legislation, and a second which the Courts attribute to the legislator who "cannot have intended to give the board an untrammeled authority to set its own jurisdiction". Even if it were true that the legislator actually had "dual intentions" in the face of a full privative clause, the problem still arises as to which "intention" should prevail

All this said, it is comforting to observe that where a full privative clause exists, Canadian courts have generally sought to put aside these theoretical difficulties and heeded the wise caution given by Dickson J. in the famous *CUPE* decision:

> *The question of what is and is not jurisdictional is often very difficult to determine. The Courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.*[39]

As more recently stated in *International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 v. Prince Rupert Grain Ltd.*:

> *There were very sound reasons for the establishment of labour boards and the protection of their decisions by broad privative clauses. Parliament and provincial legislatures have clearly indicated that decisions of these boards on matters within their jurisdiction should be final and binding. The courts could all too easily usurp the role of these boards by characterizing the empowering legislation according them authority as jurisdiction limiting provisions which would require their decisions to be correct in the opinion of the court. Quite simply, courts should exercise deferential caution in their assessment of the jurisdiction of labour boards and be slow to find an absence or excess of jurisdiction.*[40]

From a law reform standpoint, these statements are important because they demonstrate that, despite the Court's more recent announcement that the pragmatic and functional approach is to be applied generally, the presence of a full privative clause continues to carry significant weight in assisting to provide certainty with respect to determining and resolving the standard of review. As recently noted by Professor Wade MacLauchlan "The most frequently mentioned criterion affecting the standard of review is whether the challenged decision is protected by a privative clause....".[41] In the face of a full privative clause, there is a practical presumption that deference is to be granted on all questions, including questions of law. This will not prevent courts from continuing to struggle with the "pragmatic and functional" approach in difficult cases where a party asserts correctness review in the face of a full privative clause.[42] In practice, however, and as

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in a given situation. Clearly, in this context, the branding of error as "jurisdictional" has much more to do with judicial policy than with legislative intent.

39 *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.* (1979), 97 D.L.R. (3d) 417 (S.C.C.) at p. 13 (Q.L.). This passage has been quoted in more than 80 cases since 1979. For recent British Columbia cases see *White Spot Ltd. v. British Columbia (Labour Relations Board)*, [1999] B.C.J. No. 296 (C.A.); *Western Canada Wilderness Committee v. British Columbia (Chief Forester)*, [1998] B.C.J. No. 808 (C.A.).

40 [1996] 2 S.C.R. 432 at para. 26.

41 MacLauchlan, Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada (2001), 80 Can. Bar Rev. 281 at p. 291.

42 Cases on which the Supreme Court of Canada has split in identifying "jurisdictional error" include *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R.

compared to situations where there is no privative clause, a full privative clause tends to make arguments about the proper standard of review less frequent, less time-consuming and less focused on "degrees" of deference which seem to make little difference in the final results of cases.[43] It allows judges to get on with business in the fashion succinctly described by Southin J.A. in a recent case:

> *It has been said, correctly, that the standard here is one of patent unreasonableness. To my mind the practical way to address that standard is first to look at the section in issue, then to read the decisions in issue of the Labour Relations Board and finally to ask oneself if anything leaps out that indicates a lack of reason. Nothing leapt out here.... Nothing leaps out at me from the Board's decision or its reconsideration that indicates that there is any lack of proper appreciation for what it is that the Labour Board is about.*[44]

Rights of appeal to court from administrative tribunal decisions

From the perspective of legislative intent, a statutory right of appeal has traditionally been regarded as the "flipside" of a full privative clause. Until 1989, the law was clear that the creation of a special right of appeal on a question of law is to be taken as a clear legislative statement that, at least as regards legal questions, the proper standard of review is always correctness, just as the law has always been with respect to appellate review of trial court decisions.[45] The logic of that position was compelling: judicial review is always available in any event, and so – consistent

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614; *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157; *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369; *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890. There are, of course, many cases in which they have been unanimous on the proper standard of review in the face of a full privative clause, demonstrating that, overall, the standard of review is more of a problem when the legislation contains no privative provisions.

43 For a sample of recent British Columbia decisions supporting this point, see *Canadian Airlines International Ltd. v. Canadian Air Line Pilots Assn.*, [1997] B.C.J. No. 1652 (C.A.); *PCL Constructors Pacific Inc. v. International Union of Operating Engineers, Local 115*, [2000] B.C.J. No. 1252 (S.C.); *Eamor v. Air Canada Ltd.*, [1998] B.C.J. No. 1357 (S.C.); *Yee v. British Columbia (Workers' Compensation Board)*, [2000] B.C.J. No. 1482 (S.C.); *Greyhound Canada Transportation Corp. v. Brzozowski*, [1999] B.C.J. No. 2032 (S.C.); *Office and Professional Employees' International Union, Local 378 v. British Columbia (Labour Relations Board)*, [2001] B.C.J. No. 1385 (C.A.); *Alivand v. British Columbia (Workers' Compensation Board)*, [2000] B.C.J. No. 454 (S.C.); *D. Hall & Associates Ltd. v. British Columbia (Director of Employment Standards)*, [2001] B.C.J. No. 1142 (S.C.); see also the Supreme Court of Canada's recent decision in *Ivanhoe Inc. v. UFCW, Local 500*, 2001 SCC 47.

44 *Office and Professional Employees Union, Local 378 v. British Columbia (Labour Relations Board)*, [2001] B.C.J. No. 1385 (C.A.) at paras. 28-29.

45 In his article, "The Supreme Court of Canada and Tribunals" (2001), 80 Can. Bar Rev. 399 at pp. 417-18, David Mullan suggests that, from an historical perspective, curial

with the principle that legislators do not legislate unnecessarily - the creation of a statutory right of appeal to the court was taken as evidencing a legislative intention in favour of a more proactive judicial role than would take place on judicial review.

However, in 1989 the Supreme Court of Canada held in *Bell Canada v. Canada (C.R.T.C.)*[46] that even on a statutory appeal on questions of law, the court is entitled to apply a form of "discretionary" curial deference to the legal interpretations of specialized administrative tribunals on questions that fall squarely within their area of expertise. With the court's decisions in *Pezim* (1994)[47] and *Southam* (1997)[48], the law on this point became firmly ensconced. As noted above, the presence of a right of appeal is now simply one factor in the "pragmatic and functional approach".

In his 1997 Paper: "Judicial Review – No Clearer Now Than it Ever Was", Mr. Justice Vancise commented on the question whether the court's decisions were consistent with legislative intent:

> *One has to wonder what happened to legislative intent. Where does one find the primary consideration referred to in Bibeault that the intention of the legislature will ultimately decide the issue….*
>
> *If a primary consideration in the pragmatic and functional approach of Bibeault is to determine the intention of the legislature, surely the lack of protection of the decision from judicial review is a critical indication of who should decide the matter, the tribunal, even a specialized one, or the courts….*[49]

It is therefore the case today that, just as courts reserve the right not to grant curial deference on legal questions despite the express terms of a full privative clause, they reserve the right to grant curial deference on legal questions despite the express terms of a full right of appeal. As noted by Justice Vancise, this is an unusual result indeed for an approach whose litmus test is said to be "legislative intent".

In contrast to the situation with a privative clause – where legislation is subject the Constitution – legislators have greater latitude to assist courts, and to either confirm or negate the notion of

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deference on statutory appeals is not particularly unusual. However, the cases cited by Mullan refer to deference from discretionary decisions that do not involve points of law.

46 [1989] 1 S.C.R. 1722.

47 *Pezim v. B.C. (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.

48 *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

49 Hon. W.J. Vancise, "Judicial Review: No Clearer now than it ever Was" (June 1, 1997), prepared for Canadian Council of Administrative Tribunals, at pp. 30-31.

"deference" on statutory appeals. Legislators have a number of options, which include (a) specifying that, where it has granted a right of appeal, the standard of review is correctness for questions of law, or (b) abolishing the right of appeal and creating a privative clause where the Legislature is satisfied that the tribunal is in fact an expert tribunal deserving of deference.

Applying the standard of review: What standards of review are potential products of the pragmatic and functional approach?

The administrative law decisions of the Supreme Court of Canada have identified three specific standards of review. Before proceeding further with the discussion, it will be useful to outline those standards as they have been articulated by the court:

"Correctness"

The correctness test is the most "exacting" standard of review. A court applying the "correctness" test is entitled to reverse the decision in question on the simple basis that the court disagrees with the tribunal on the point in issue.

The "patently unreasonable" test

The "patently unreasonable" test is the most "deferential" standard of review in Canadian law. It is most commonly applied in the case of administrative tribunals whose decisions are protected by full privative clauses. The Supreme Court of Canada has described this test as follows in two commonly cited passages:

> *It is said that it is difficult to know what "patently unreasonable" means. What is patently unreasonable to one judge may be eminently reasonable to another. Yet the test can only be defined by words, the building blocks of all reasons. Obviously, the patently unreasonable test sets a high standard of review. In the Shorter Oxford English Dictionary, "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational.... Not acting in accordance with reason or good sense." Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test.....*[50]
>
> *The patently unreasonable error test is the pivot on which judicial deference rests. As it relates to matters within the specialized jurisdiction of an administrative body protected by a privative clause, this standard of review has a specific purpose: ensuring that review of the correctness of an administrative*

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50 *Canada (Attorney General) v. Public Service Alliance of Canada* (1993), 101 D.L.R. (4th) 673 (S.C.C.) at pp. 690-91.

> *interpretation does not serve, as it has in the past, as a screen for intervention based on the merits of a given decision. The process by which this standard of review has progressively been accepted by courts of law cannot be separated from the contemporary principle of curial deference, which is, in turn, closely linked with the development of extensive administrative justice (see Cory J.'s reasons in PSAC No. 1 and PSAC No. 2, supra, and National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324 (per Wilson J.)). Substituting one's opinion for that of an administrative tribunal in order to develop one's own interpretation of a legislative provision eliminates its decision-making autonomy and special expertise. Since such intervention occurs in circumstances where the legislature has determined that the administrative tribunal is the one in the best position to rule on the disputed decision. it risks, at the same time, thwarting the original intention of the legislature. For the purposes of judicial review, statutory interpretation has ceased to be a necessarily "exact" science and this Court has, again recently, confirmed the rule of curial deference set forth for the first time in Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp....*[51]

The "reasonableness *simpliciter*" test

This standard was first identified in *Southam*, and has particular application in a context such as statutory appeal where the legislation gives indications both "for" and "against" deference on a particular question. It was defined and distinguished from the other two standards; for present purposes, it is worthy of quotation in full:

> *I conclude that the third standard should be whether the decision of the Tribunal is unreasonable. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.*
>
> *The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in Canada*

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[51] *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756; See also: *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.* (1993), 102 D.L.R. (4th) 402 (S.C.C.) ["*Bradco Construction*"] at p. 418: "Once it has been determined that curial deference to a particular decision of a tribunal is appropriate, the tribunal has the right to be wrong, regardless of how many reviewing judges may disagree with the decision".

> *(Attorney General) v. Public Service Alliance of Canada, [1993] 1 S.C.R. 941, at p. 963, "[i]n the Shorter Oxford English Dictionary 'patently', an adverb, is defined as 'openly, evidently, clearly'". This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem…. But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident….*
>
> > *The standard of reasonableness simpliciter is also closely akin to the standard that this Court has said should be applied in reviewing findings of fact by trial judges. In Stein v. "Kathy K" (The Ship), [1976] 2 S.C.R. 802, at p. 806, Ritchie J. described the standard in the following terms:*
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> *. . . the accepted approach of a court of appeal is to test the findings [of fact] made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view of the balance of probability. [Emphasis added.]*
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> > *Even as a matter of semantics, the closeness of the "clearly wrong" test to the standard of reasonableness simpliciter is obvious. It is true that many things are wrong that are not unreasonable; but when "clearly" is added to "wrong", the meaning is brought much nearer to that of "unreasonable". Consequently, the clearly wrong test represents a striking out from the correctness test in the direction of deference. But the clearly wrong test does not go so far as the standard of patent unreasonableness. For if many things are wrong that are not unreasonable, then many things are clearly wrong that are not patently unreasonable (on the assumption that "clearly" and "patently" are close synonyms). It follows, then, that the clearly wrong test, like the standard of reasonableness simpliciter, falls on the continuum between correctness and the standard of patent unreasonableness. Because the clearly wrong test is familiar to Canadian judges, it may serve as a guide to them in applying the standard of reasonableness simpliciter.*

Other standards of review

While the Supreme Court of Canada's decisions have only sought to define to three standards of review, a number of lower courts have taken note of the Court's repeated reference to a "nuanced" approach, which results in a "range" or "spectrum" of review standards. In a recent British Columbia decision, Bauman J. referred to the three standards above as "major signposts".[52] The Newfoundland Court of Appeal recently stated that "There may well be other,

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52 See *Baker v. Canada, supra.* See also the thoughtful comment of Bauman J. in *International Forest Products Ltd. v. British Columbia (Forest Appeals Commission)*, [1998] B.C.J. No. 1314 (S.C.) at para. 39: "One concludes that the number of "standards" on the spectrum is theoretically infinite but that, practically, we require major signposts marking credibly distinctive standards."

as yet unarticulated, standards."[53]

From time to time since *Southam*, lower courts applying the "pragmatic and functional approach" have in fact sought to articulate other standards of review. In one case, the Alberta Court of Appeal held that it would not intervene on a particular question decided by an Assessment Appeal Board absent a "*nearly* patently unreasonable error".[54] The British Columbia Court of Appeal recently introduced the concept of "correctness with appropriate deference".[55] For its part, the Federal Court of Appeal has stated that there exists "a fourth standard of review that falls between reasonableness *simpliciter* and patent unreasonableness..."[56]

5 DIFFICULTIES ARISING FROM THE ANALYTICAL APPROACH TO DETERMINING THE STANDARD OF REVIEW IN CANADIAN ADMINISTRATIVE LAW

The "framework" for the pragmatic and functional approach summarized in *Pushpanathan* - which approach the court in *Baker v. Canada* subsequently announced also extends to determining the standard of review from exercise of discretion by administrative tribunals[57] - occupies seven pages in the Dominion Law Reports.[58] The requirement to carefully review and apply these pages in each case would of course be a small price to pay if they allowed counsel and judges to efficiently and predictably resolve the standard of review in cases arising before them.

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53 *Osmond v. Newfoundland (Workers' Compensation Commission)*, [2001] N.J. No. 211 (Newf. C.A.) at para. 79.

54 See *Rickard Realty Advisors Inc. v. The City of Calgary* (1998), 216 A.R. 271 (C.A.) at p. 276.

55 *Northwood Inc. v. British Columbia (Forest Practices Board)*, [2001] B.C.J. No. 365 (C.A.) at paras. 35-38.

56 *British Columbia (Vegetable Marketing Commission) v. Washington Potato and Onion Assn.*, [1997] F.C.J. No. 1543 (C.A.). The full passage, at para. 3, reads as follows: "It follows that there is a fourth standard of review that falls between reasonableness simpliciter and patent unreasonableness which is reserved for those cases where a decision has been rendered by an expert tribunal on an issue within its field or expertise and has arrived at a higher Court by way of application for judicial review. This fourth standard of review requires more deference to a tribunal's findings than that given to expert tribunals containing a statutory right of appeal but slightly less deference than that given to tribunals protected by a true privative clause.

57 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 52-55.

58 (1998), 160 D.L.R. (4th) 193 (S.C.C.) at pp. 209-215.

However, a review of case law in the three years since *Pushpanathan* was decided tends to support the view that significant amounts of time and resources continue to be expended preparing for and arguing about what the proper standard of review should be, particularly where the enabling legislation does not contain a full privative clause. While there is not always a direct correlation between the intensity of argument on a point and its treatment in judicial reasons,[59] the jurisprudence both in British Columbia[60] and in other provinces[61] does not support the conclusion that *Pushpanathan* has clarified or simplified matters for parties, counsel and courts. In general, determining the proper standard of review remains the subject of much greater time and expense than is incurred on the same issue in civil or criminal appeals, or in administrative law cases where there is a full privative clause. As neatly summed up by the Ontario Divisional Court in a recent case:

> *Identifying the particular standard of review to be applied in any given case is not a simple matter. The standard may be different not only from one tribunal to another, but also for different kinds of decisions by the same tribunal.*[62]

As Professor Wade MacLauchlan has recently stated: "...it is apparent from the continuing volume of judicial review cases that parties who are not happy with an administrative tribunal

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59 See for example *Canadian Union of Postal Workers v. Canada Post Corp.*, [2001] B.C.J. No. 680 (C.A.) at para. 13: " Much time at the hearing of this appeal was spent on the appropriate review standard". However, the Court went on to address the matter quite succinctly.

60 For a sample of British Columbia cases, see *Al Stober Construction Ltd. v. Long*, [2001] B.C.J. No. 1086 (S.C.) (14 QL pp. to determine standard of review), *Beazer East, Inc. v. British Columbia (Environmental Appeal Board)*, [2000] B.C.J. No. 2358 (S.C.) (18 QL pp. to determine standard of review); *Northwood Inc. v. British Columbia (Forest Practices Board)*, [2001] B.C.J. No. 365 (C.A.) (12 QL pages to determine standard of review); *Casson v. British Columbia College of Teachers*, [2000] B.C.J. 1038 (S.C.) (12 QL pages to determine standard of review]; *Aquasource Ltd. v. British Columbia (Information and Privacy Commission)*, [1998] B.C.J. No. 1927 (C.A.) (13 QL pages to determine standard of review).

61 *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, [2001] O.J. No. 3323 (C.A.); *Runnymede Development Corporation Limited v. 1201262 Ontario Inc. et al.*, [2000] O.J. No. 981 (S.C.J.); *McCain Foods (Canada), a division of McCain Foods Ltd. v. Alberta (Environmental Appeal Board)*, [2000] A.J. No. 1075 (Q.B.); *Calgary (City) Electric System v. Weitmann*, [2001] A.J. No. 289 (Q.B.); *Amalgamated Transit Union, Local 1374 v. Saskatchewan Transportation Co.*, [2001] S.J. No. 484 (Q.B.); *Osmond v. Newfoundland (Workers' Compensation Commission)*, [2000] N.J. No. 211 (Newf. C.A.).

62 *Runnymede Development Corporation Limited v. 1201262 Ontario Inc. et al.*, [2000] O.J. No. 981 (S.C.J.), at para. 29.

decision still take a "what have we got to lose" approach when assessing their prospects of success on judicial review."[63]

The time and expense that continue to be incurred in defining the proper standard of review reflect the difficulty inherent in applying the pragmatic and functional approach, particularly where there is no privative clause. Factors such as "relative expertise", "polycentricity" and "the nature of the question" are particularly elastic.

Some tribunals now receive greater deference on statutory appeal than others receive on like questions on judicial review. Because of the Supreme Court of Canada's direction that the standard of review can only be determined on an "issue specific" basis, the question must be argued afresh in each case a point well-illustrated by a number of judicial review decisions dealing with bodies such British Columbia's Freedom of Information and Privacy Commissioner and the Human Rights Tribunal.[64]

For example, the question of how to understand "relative expertise" – said to be "the most important factor" in many cases - has been less than clear. Some authorities understand the notion of "relative expertise" to favour deference only if the court is in a *worse* position than the tribunal vis-a-vis the issue on review. In other cases, the courts have accorded deference if the tribunal "is at least as well placed as a court to resolve the issue in dispute".[65] With respect to legal questions, some courts bristle against suggestions of deference, stating that "statutory interpretation is part of the regular work of the superior courts"[66], while others are more willing to

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63 Wade MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 Can. Bar Rev. 281 at 292.

64 See for example, *Dutton v. British Columbia (Human Rights Tribunal)*, [2001] B.C.J. 1794 (S.C.); *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 1030 (S.C.).

65 In favour of granting deference where the agency is at least as well placed to answer the question as the reviewing court, see Brown and Evans, Judicial Review of Administrative Action (2001), pp. 15-41 to 15-42; see also *Vancouver (City) Police Department v. British Columbia (Police Commission)*, [1999] B.C.J. No. 1796 (S.C.) at para. 34: "Having no greater expertise than the Commission in this regard, I consider that this factor supports a finding that the Commission be accorded a high degree of deference." By way of contrast, see *Aquasource v. Freedom of Information and Protection of Privacy Commissioner*, [1998] B.C.J. No. 1927 (C.A.) at para. 22: "As it is my view that this case is primarily one of statutory interpretation, I hold that the reviewing Court is as well equipped as the Commissioner to settle the meaning of s.12. This is the traditional role of the Court. The Commissioner possesses no special expertise in statutory interpretation which would justify according deference to his interpretation of a provision such as s. 12."

66 *Aquasource v. British Columbia (Freedom of Information and Protection of Privacy Commissioner)*, *supra*, note 59, at paras. 22-24.

follow the *CUPE* approach and to grant deference to ambiguous legal questions without necessarily conceding judicial inferiority.[67] Robert Hawkins, whose writing has emphasized the link between curial deference and judicial understandings of tribunal reputation, has commented on the courts' treatment of this factor as follows:

> *In the final analysis, the court's theory for determining the expertise of administrative agencies, and so for determining the degree of deference that they will be shown, falls apart under its own subjectivity. In terms of measuring expertise, the focus on the "role of the tribunal" is too narrow an inquiry to yield a true appreciation of the agency's degree of specialization. In terms of the relevance of expertise, the description and mapping of the "nature of the question" is too much based on result-driven labeling to provide a satisfactory answer to the question of who does what best and why. In the result, the degree of judicial scrutiny of administrative decisions appears to depend on little more than judicial preference for certain tribunals and certain outcomes.*
>
> *However, this is only the court's announced theory of expertise and rationale for deference…. The board's public reputation for competence will influence a judge when this comparison of expertise is made. This link is made possible because expertise is a vague and impressionistic concept.*[68]

As for the direction to inquire into "the purpose of the Act as a whole and the provision in particular", lower courts are required to distinguish between "bipolar" disputes and those that are more properly referred to as "polycentric". "Polycentricity" - an unfortunate piece of jargon that has entered the Canadian jurisprudential lexicon – is a term introduced by the famous American scholar Lon Fuller. Fuller himself recognized the problematic nature of the term "polycentricity", observing that "concealed polycentric elements are probably present in almost all problems resolved by adjudication".[69] Many matters decided by administrative tribunals may involve bipolar dispute resolution, but *also* necessarily involve "large numbers of interlocking interests" (even if those interests are not represented at the hearing) or involve "open textured" legal standards. Determining the extent to which the "bipolar" versus "polycentric" elements in a dispute operate "for", "against" or "neutral" in respect of curial deference is not an easy exercise.

Finally, with respect to the nature of the question, the distinction between questions of fact and questions of law remains important, and since *Southam*, appears to turn on the judicial

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67 *Tin v. British Columbia (Ministry of Human Resources)*, [1998] B.C.J. No. 3273 (S.C.) at paras. 42-47.

68 Hawkins, "Reputational Review I: Expertise, Bias and Delay" (1998), 21 Dal. L.J. 5 at p. 24.

69 See Allison, "The Procedural Reason for Judicial Restraint" (1996), 42 Pub. Law 452 at p. 457.

assessment whether "a particular set of circumstances is apt to be of much interest to lawyers and judges in the future".[70]

As one commentator has noted, the application of these factors to individual cases can be "highly subjective".[71] It may indeed be said, without a hint of sarcasm, that the "pragmatic and functional approach" is often neither "pragmatic" nor "functional". As noted by Blake in *Administrative Law in Canada*: "The difficulty lies in ascertaining when each standard of review applies. Not even the courts are always certain when to apply which standard of review. Sometimes, after finding a tribunal's decision to be reasonable, a court comments that it also considers the interpretation to be correct."[72]

The 1997 paper of Mr. Justice Vancise, one of Canada's leading administrative law jurists, aptly outlines its message: "*Judicial Review – No Clearer Now than it Ever Was*". His 42 page paper closed with comment: "The view gets no better – the direction is not clear – one can only hope for inspiration".

For their part, Brown and Evans offer a more sympathetic assessment of the jurisprudence:

> *... a degree of uncertainty is inevitable in any analytical approach that stresses the importance of interpreting the text of the statute within the legal and regulatory contexts of the particular administrative scheme it governs. It is not possible, for example, to reduce the weight to be given to each of the various factors comprising the "pragmatic and functional analysis" to a single legal rule. Nor is it possible to provide a finely calibrated measure of an agency's expertise, or to define the degree of determinateness in statutory language. And given the kaleidoscope of administrative agencies, public programmes, legal powers, statutory mandates, individual interests and legislative language, close cases as to whether judicial review should be based on the standard of "correctness" or the less intense one of "rationality" necessarily call for an exercise of judgment that cannot be predetermined.*[73]

Brown and Evans are undoubtedly correct that one cannot eliminate the exercise of judgment in determining the proper standard of review. However, one does not observe commentators or courts advocating either the elimination of judgment or the creation of a "single legal rule". The question is not whether a degree of uncertainty is inevitable, but whether the degree of uncertainty that exists at present ought to be, or can be, limited.

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70 See *Pushpanathan, supra*, p. 214.

71 See Chaplin, "Who is best suited to decide?" (1994), 26 Ott. L. Rev. 321 at p. 129 (Q.L.).

72 Blake, Administrative Law in Canada (1997) (2nd ed.), p. 166.

73 Brown and Evans, Judicial Review of Administrative Action in Canada (2001) at p. 14-42.

For purposes of potential law reform, the passage from Brown and Evans begs the question whether, in a test whose stated purpose is to determine *legislative intent* regarding the standard of review, legislative clarity might meaningfully limit the time, expense and uncertainty that appear to be so pronounced where legislation is ambiguous. It would be paradoxical indeed if a clearer expression of legislative intent were incapable of reducing the complexity inherent in a test that the courts have repeatedly emphasized is designed to ascertain legislative intent.

In the end, for all the academic appeal of the pragmatic and functional approach, one is hard pressed to disagree with this assessment by David Jones, Q.C., which passage will likely resonate for both parties and courts who must grapple with this issue:

> *The result of many of the recent decisions of the Supreme Court [on the standard of review] is to increase uncertainty, thereby encouraging litigation, and putting a premium on the creativity and advocacy skills of counsel.*[74]

Of interest in this context is a recent British Columbia Court of Appeal decision that openly refused to engage in the "elaborate" process required by *Pushpanathan*, holding that it was unnecessary to do so based on the Board's "clear misinterpretation" of its powers.[75] The practical appeal of the court's approach is undeniable. At the same time, it raises legitimate questions about whether the law has become so cumbersome that it risks being ignored, thus undermining its very purpose.[76]

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74 Jones, "A Year 2000 Review of Standards of Review", Paper Prepared for Canadian Bar Association (BC) Administrative Law Branch at p. 24.

75 *(Minister of Forests) v. Canadian Forest Products Ltd.*, [2000] B.C.J. No. 1692 (C.A.).

76 As emphasized in *Domtar Inc. v. Quebec*, [1993] 2 S.C.R. 756, curial deference means that the tribunal is entitled to make its own decision, and not necessarily the decision the Court would have made. Applying "correctness" review in cases where deference ought to have been granted has two potentially undesirable consequences. First, if the Court overturns the tribunal, it may wrongly be substituting the Court's view for that of the tribunal. Second, even if the Court upholds the Tribunal, it may thereby "codify" that decision, thus fettering future tribunal panels from taking a different view of the matter. In *Domtar*, the Court made clear that conflicting tribunal decisions are not only permissible, but sometimes necessary: "So far as judicial review is concerned, the problem of inconsistency in decision-making by administrative tribunals cannot be separated from the decision-making autonomy, expertise and effectiveness of those tribunals.... If Canadian administrative law has been able to evolve to the point of recognizing that administrative tribunals have the authority to err within their area of expertise, I think that, by the same token, a lack of unanimity is the price to pay for the decision-making freedom and independence given to the members of these tribunals. Recognizing the existence of a conflict in decisions as an independent basis for judicial review would, in my opinion, constitute a serious undermining of those principles. This appears to me to be especially true as the administrative tribunals, like the legislature, have the power to resolve such conflicts themselves. The solution required by conflicting decisions among

Nor has the Supreme Court of Canada's own approach provided a consistent example to lower courts. The overwhelming majority of its decisions make clear that, as a matter of logic and principle, one must necessarily determine the standard of review before one engages in the review itself. So it was that the majority of the court in *Paccar* and subsequent cases rejected Sopinka J.'s approach in that case of applying a "correctness" test first, and asking whether deference was due only if the decision was "incorrect". To take this approach - which is tantamount to a Court of Appeal stating that it will only inquire into whether deference is due on questions of fact if it does not "agree" with the finding of fact - could easily undermine the very purpose of the inquiry and potentially fetter the tribunal.[77] Yet in 1997, only one year before *Pushpanathan*, the Supreme Court resurrected the Sopinka approach without explanation, stating: "I have concluded that the decision of the Board was correct. It is therefore not necessary to deal with the issue of the standard of deference owed to decisions of the Board."[78] It then took the opposite approach in *Pushpanathan* and all its subsequent decisions, even where it has applied a "correctness" test.

It must also be remembered that *determining* the standard of review is only the first step for the court. Next comes the task of *applying* the appropriate standard. In this respect, it is observed that the notion of a "spectrum" of review standards, together with the introduction of the "reasonableness *simpliciter*" test, has given rise to its own complications. Despite the Supreme Court of Canada's significant efforts to explain these different standards of review, courts continue to struggle, particularly with the distinction between the "patently unreasonable" test and the "reasonableness *simpliciter*" test. See for example the comments of Barry J. in *Miller v. Workers' Compensation Commission (Nfld.)*:

> *In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects at all.*[79]

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administrative tribunals thus remains a policy choice which, in the final analysis, should not be made by the courts."

77 *Ibid.*

78 *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32, heading "K". The Court then went on, in *obiter dicta*, to address the standard of review, concluding that the standard was correctness.

79 [1997] N.J. No. 159 (Newf. T.D.) at para. 27.

See also the following recent comments of Reed J., an experienced administrative law justice of the Federal Court:

> *I am prepared to adopt the standard of reasonableness simpliciter as applicable to the visa officer's decision. I note that I have never been convinced that "patently unreasonable" differs in a significant way from "unreasonable". The word "patently" means clearly or obviously. If the unreasonableness of a decision is not clear or obvious, I do not see how that decision can be said to be unreasonable.*[80]

The above passages also call to mind the famous *Paccar* decision wherein there was universal agreement on the standard of review (patently unreasonable), with two judges stating the decision *was* patently unreasonable, two stating that it was *not* patently unreasonable and two stating that it was "correct"![81]

These passages, together with the practical experience of counsel and judges, call into legitimate question how helpful it is – once the conclusion has been reached that considerable deference is owed to the tribunal - to spend too much analytical effort on fine distinctions between whether the appropriate standard of review is "patently unreasonable", "unreasonable", or some other standard on the "spectrum" such as "nearly patently unreasonable". It has often been observed that where a court sees a clear injustice, it will tend to intervene regardless of how the standard is articulated. Indeed, the author has not located a single case where a court, having concluded that deference was due, stated that the outcome of the case turned on the distinction between the "unreasonableness *simpliciter*" test and the "patently unreasonable" test. The law reform consequences of these realities will be considered below.

6 WHAT EXPLAINS THE ADDED COMPLEXITY INVOLVED IN DETERMINING THE STANDARD OF REVIEW IN ADMINISTRATIVE LAW?

As has already been noted, resolving the standard of review is, outside administrative law, a familiar issue for the judiciary and is, by and large, coherent. As one reflects on Canadian law and the implications for potential law reform, one is driven to ask: what it is about administrative law that has posed such unique challenges to establishing a relatively simple and straightforward set of "standard of review" principles?

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80 *Hao v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 296 (T.D.) at para. 9.

81 *Caimaw v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983.

The answer is that, particularly over the past 20 years, reviewing courts have been asked to grant deference to administrative tribunals in areas and in ways that extend beyond the deference that appeal courts have traditionally granted to trial courts.

While a minor part of the difficulty (now largely resolved) has involved determining the test for reviewing findings of fact,[82] by far the most difficult and controversial area for the courts has been whether or not administrative tribunals ought to receive deference on questions of law. "Question of law" issues regularly arise in cases involving statutory interpretation, the application of facts to law and the review of discretion.

Our legal system is founded on the fundamental premise that the courts are the ultimate arbiters of the rule of law. It is a core function of courts in civil and criminal cases to assess and choose between competing conceptions of "the law" as tendered by the parties. Whether the dispute is founded upon statute or common law, and whether or not the problem is simple or complex, the courts have a duty to deliberate and produce a statement of "the law" so far as is necessary to resolve the dispute.

The law, as stated by lower courts, stands as "correct" unless and until reversed as "erroneous" by higher courts. As noted in Part 4 above, a key purpose of appellate courts is to ensure that lower courts correctly state the law. Where questions of law are concerned, there is a clear hierarchy as between appeal courts and lower courts. Because "error" is the test for appellate intervention on questions of law, all appellate argument is framed and debated accordingly. Indeed, for all the modern talk about "ambiguity", "policy" and "relativism" informing what we call "the law", the fact is that there are many cases in which reasonable observers will agree that

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82 On judicial review, the law is clear relief will not be granted based on an error of fact unless the tribunal has arrived at a key finding of fact without any evidence. The leading case is *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 at paras 42-43: "It has been held that a finding based on "no evidence" is patently unreasonable. However, it is clear that a court should not intervene where the evidence is simply insufficient. As Estey J., dissenting in part, noted in *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245, at p. 277: '. . . a decision without any evidence whatever in support is reviewable as being arbitrary; but on the other hand, insufficiency of evidence in the sense of appellate review is not jurisdictional, and while it may at one time have amounted to an error reviewable on the face of the record, in present day law and practice such error falls within the operational area of the statutory board, is included in the cryptic statement that the board has the right to be wrong within its jurisdiction, and hence is free from judicial review.' When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact": *Lester (W. W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, at p. 669 *per* McLachlin J. All these tests are strict...".

there is no better word than "error" to describe what happened at trial: the trial judge simply got it "wrong". And thank heavens, in those cases, for the Court of Appeal.

However, observers familiar the standard of review cases are often well aware that there are other cases in which one cannot dismiss these more "modern" concepts. When the Supreme Court of Canada considers a question of law and reverses the unanimous view of a provincial Court of Appeal, or splits 5-4 within its own ranks, more careful reflection is required about what it means to say that the lower court, or the dissenters, "erred". Is it not more accurate in such a case to observe that this particular question of law was not akin to resolving a math problem, that there was ambiguity, that the exercise may have involved difficult policy judgments and that, in the end, "correctness" is merely a shorthand way of saying that the majority on the highest court has to prevail because society requires certainty? Is there not a fair measure of truth in the saying that any particular majority of the Supreme Court of Canada has been "right" because it was "last" following the abolition of Privy Council appeals in 1949? An affirmative answer to these questions certainly appears to be consistent with the view of Mr. Justice Lambert who, while being doctrinally unique in articulating the notion of "correctness with appropriate deference"[83], authored this candid and insightful passage:

> *Reasons for judgment of the judges of this Court are described as "opinions" in the Court of Appeal Act. (See s. 21). Indeed judges often feel that they are not right or wrong, correct or incorrect, in a particular case. Rather, they form opinions. Almost all arguments about statutory interpretation in this Court, and indeed arguments about many other questions, consist of reasoned thinking supporting one view or the other. In the end, judges tend not to say that one argument is correct and the other incorrect. They say that they adopt, accept, or prefer one argument to another and give their opinions accordingly...*[84]

The fact that many questions of law do not give rise to a single, objectively "true" answer does not, of course, stop Courts of Appeal from reversing trial judges if they opine that the trial judge did not arrive at the best answer to a difficult question of law. Ambiguity in statutory interpretation cannot justify deference on questions of law as between an appeal court and a trial court. This is not because trial judges are inferior legal thinkers to Court of Appeal justices. Rather, for a Court of Appeal to defer to a trial judge's findings of law would subvert the legislative intent in creating a

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83 Lambert J.A.'s reference to a "correctness with deference" standard of review has spawned significant academic comment: see Falzon, "Self-Governing Professions: The Standard of Review" (CLE, June, 2001), pp. 9-12; Groberman, "Recent Developments in Administrative Law" (November, 2001); Lovett, "Deference within a Standard of Review of Correctness?" (2001), 59 The Advocate 703.

84 *Northwood Inc. v. British Columbia (Forest Practices Board)*, *supra*, at para. 36.

Court of Appeal whose process, structure and appointments are all founded on that court having the right to articulate the law as it thinks best. As the author has written elsewhere:

> *For the Supreme Court of Canada, the "correctness" test is not so much a rejection of the ambiguity inherent in decision-making as a statement that the Court, as a matter of legislative intent and/or judicial policy, is entitled to finally resolve that ambiguity as it sees fit. Just as a Court of Appeal will not ignore the considered view of a trial judge on the law, the correctness test does not mean that the reviewing court ignores the considered view of the tribunal. Review for correctness does mean that, in the end, the reviewing Court takes full responsibility for resolving the ambiguity in the fashion that best promotes the law. Review for correctness is therefore a statement that the court's opinion about the best answer to a question decided by the tribunal is to prevail...*[85]

Administrative law cases have posed two fundamental challenges to the traditional notion that the court's opinion about the best answer to a question of law ought to prevail. First, legislation often includes clauses designed to discourage courts from assuming a traditional appellate role, and in favour of the tribunal taking responsibility for providing the "best" answer to legislative ambiguity. Second, where legislation is silent - and even where it appears to encourage the court to assume its traditional appellate role on questions of law - courts themselves have expressed concern about their own ability to provide a "better" answer to an ambiguous legal question than that of the tribunal. Both instances trigger the concept of "curial deference":

> *"Curial deference" means that the tribunal's opinion about the best answer is to prevail, unless it exceeds judicially defined tolerance limits. Within those tolerance limits, which may vary from issue to issue, deference is a statement that the tribunal has the right to resolve competing arguments and ambiguities as it thinks best. While this is sometimes couched as the "right to be wrong", it is more accurate to equate "deference" with autonomy – autonomy over and above that one might grant to a trial judge whose decision is challenged on appeal. The "right to be wrong" really, truly, means allowing a decision to stand even if a court does not think the tribunal got the "best" or "right" answer. Deference is thus not a matter of agreeing, but tolerating – with tolerance here flowing from the court's acceptance of tribunal specialization, deriving for example from legislative intent, statutory purpose, the need for finality or tribunal expertise. It is, at times, an uneasy sort of tolerance born of some pretty fundamental debates about the proper role and status of administrative tribunals, their relationship to courts, and the nature of tolerance itself when held by human beings whose values, philosophies and senses of justice may differ quite significantly from one to the next.*[86]

When it comes to deciding whether to grant deference on questions of law, it is no understatement to describe the tensions as being "fundamental". The following passage from the

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85 Falzon, "Challenging Decisions of Self-Governing Professions: The Standard of Review" (2001), *Self Governing Professions*, ch 4.2, p. 7 (Continuing Legal Education).

86 *Ibid.*

concurring judgment of Wilson J., Dickson C.J.C. and Lamer J. in *National Corn Growers* vividly expresses the case against adopting a traditional "appellate" posture on questions of law decided by agencies:

> *Canadian courts have struggled over time to move away from the picture that Dicey painted toward a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state. Part of this process has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise.*
>
> *Courts have also come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work. Evans et al. point out, for example, that "[o]ne of the most important developments in contemporary public law in Canada has been a growing acceptance by the courts of the idea that statutory provisions often do not yield a single, uniquely correct interpretation, but can be ambiguous or silent on a particular question, or couched in language that obviously invites the exercise of discretion": see Evans et al., op. cit., at p. 414. They then note:*
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> > *In administrative law, judges have also been increasingly willing to concede that the specialist tribunal to which the legislature entrusted primary responsibility for the administration of a particular programme is often better equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language. Interpreting a statute in a way that promotes effective public policy and administration may depend more upon the understanding and insights of the front-line agency than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law. Administration and interpretation go hand in glove. [Emphasis added.]*
>
> *Evans et al. point out that as a result of this extensive string of decisions courts have increased agency autonomy in recent years. They emphasize that "judicial decisions have recognized that it is a distortion of our system of government to regard the courts as sitting at the apex of a hierarchy of bodies that are performing essentially the same tasks for which courts' procedures, personnel, knowledge, and approaches are perfectly apt": see Evans et al., op. cit., at p. 530.*
>
> *It is my view, then, that courts in this country have come to accept that there is a significant measure of truth to the comment of Professor Arthurs in "Protection against Judicial Review" (1983), 43 R. du B. 277, at p. 289:*
>
> > *There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that*

> *purpose, who strives to do so daily, and is well-aware of the effect upon the purpose of the various alternate interpretations....*[87]

These passages have never been rejected. The Supreme Court of Canada has frequently cited *National Corn Growers* in its "standard of review" decisions. Of particular note is a 1993 decision in which the majority quoted much of the above.[88] As recently as 1998, Chief Justice McLachlin put it this way in an article: "...I believe that one of the most intriguing aspects of the new Rule of Law is that it makes it possible for institutions other than courts to play key roles in maintaining it. It opens the door to the idea that courts do not necessarily have a monopoly on the values of reason and fairness"....[C]ontrary to Dicey's view that the courts' primary role is to constrain, limit and, if possible eliminate administrative power, the new Rule of Law allows courts to respect and advance the roles of administrative tribunals. The courts' role shifts from being a brute guardian of an artificial and restrictive Rule of Law to that of a partner....."[89]

These sorts of statements could have been utilized to support a single test of "reasonableness" or "rationality" for the review of any decision made by a tribunal, without qualification, and without carving out a special category for "legal" or "jurisdictional" error. However, in the absence of a full privative clause, it would be very wrong to believe that courts have been prepared to embark upon a general paradigm shift and assume a general posture of deference on questions of law. In the absence of a full privative clause, courts have tended to apply a practical presumption that questions of law are to be reviewed for correctness, unless a case for deference is made out on a tribunal by tribunal – and more recently, an issue by issue - basis.

What caused the courts to resist – in the absence of a full privative clause - a more literal and general application of the passage from *National Corn Growers*? A number of factors may be suggested.

First, and to be blunt, justices are not blind. They witness significant variation in the calibre of administrative tribunal decisions that come before them. They are well aware of the realities of an appointments process which, depending on the tribunal, may contain very few safeguards to ensure either merit or independence in decision-makers, which factors may influence the judicial perception of the particular tribunal.[90] In such a world, and in the absence of legislative reform,

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87 *National Corn Growers Assn v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324.

88 *Canada (Attorney General) v. PSAC* (1993), 101 D.L.R. (4th) 673 (S.C.C.).

89 *Supra*, note 9 at pp. 174-175.

90 Hawkins, *supra*, note 69 at pp.13-15.

generalized appeals to the "legislative ambiguity" in the "post-Dicey" world will do little to persuade a sophisticated justice that curial deference ought to be granted to a poorly written tribunal decision that itself seems to pay little attention to the questions of law respecting which deference is later sought. It has been wisely observed that "The presumption of deference is easier to support when the challenged decision is supported by reasons".[91]

Second, having recognized that a "reputational" component (both for the tribunals and for the courts) can be implicit in the question whether to grant deference to a tribunal on a question of law, there are many instances in which the refusal to grant deference is "nothing personal". The court's traditional role as being the ultimate arbiter of legal questions is deeply embedded in our legal system; a general diminution of the court's function of providing the "correct" answer on all questions of law instinctively rubs against the judicial (and to some extent, societal) grain. As colourfully noted by Holloway: "... when scholars carp at judicial resistance to modern administrative schemes, they should be aware that they are not simply fighting against the musings of an Oxford don of the last century, but rather against almost eight hundred years of legal evolution".[92] Rather than voluntarily cede their role as the presumptively "best" forum to resolve questions of law, Canadian courts have rightly looked for a clear expression of legislative intent on the question.

Third, in contrast to the reality that may have prevailed during other periods in our history, the fact is that today many superior court justices have a very sophisticated understanding of public law issues. In the absence of legislative intent emphasizing the importance of finality or tribunal expertise, it may be more difficult to argue that correctness review by the courts will systematically undermine legislative intent.

The tensions described above are at least as relevant to the creation of legislative policy as they are to judicial policy. Rather than leave these policy tensions for courts to resolve at large on a case-by-case basis according to a legislative intent that is often less than clear, legislators have the option of clearly expressing their intention regarding the proper role of the courts in reviewing decisions of the tribunals they create. While there will always be complicated cases because there are constitutional limits to be respected, there is room, within those limits, for legislators to make life significantly more straightforward for parties and for courts.

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91 Wade MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 Can. Bar Rev. 281 at p. 293.

92 Holloway, "A Sacred Right": Judicial Review of Administrative Action as a Cultural Phenomenon (1993), 22 Man. L.J. 28 at paras. 11 and 84.

Before discussing potential legislative options for British Columbia, it will be useful to consider how the issue has been addressed in other free and democratic societies, namely, England and the United States of America.

7 THE ENGLISH AND AMERICAN SOLUTIONS

England

The law of England has developed very differently from the law of Canada with respect to the standard of review. The leading cases are *Anisminic Limited v. Foreign Compensation Commission*, [1969] 2 A.C.147, *O'Reilly v. Mackman*, [1983] 2 A.C. 237 and *R. v. Hull University Visitor*, [1993] A.C. 682. These decisions have enabled the authors of de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed, 1995) to offer an enviably succinct statement of the law of judicial review in England:

> *..all power can be appropriately reviewed today under which might be described as the principles of lawful or legitimate administration. These principles enunciated as "grounds" of judicial review, were conveniently set out by Lord Diplock in the GCHQ case (a case itself involving review of prerogative power) as "legality", "procedural propriety" and "rationality". These requirements form a firm foundation upon which to review the public functions of modern administration and do not depend upon the limited notion of jurisdiction or vires in its narrow sense.*[93]

English jurisprudence categorically rejects the notion that curial deference ought ever to be granted to administrative tribunals on questions of law. In fact, the authors of de Smith – while not mentioning Canadian law on this point – offer a sobering criticism of "a purely pragmatic or functional" approach as being at once unprincipled and the source of both confusion and "a wilderness of single instances".[94]

Except in very limited circumstances, English courts have abandoned the task of seeking to distinguish between errors of law that are "jurisdictional" and those that are "non-jurisdictional". Their solution has been to hold that any material error of law constitutes jurisdictional error sufficient to nullify a decision. In England, not even a full privative clause will oust the courts' jurisdiction to review for correctness on a question of law:

> *In matters of public law, the role of the ordinary courts is of high constitutional importance. It is a function of the judiciary to determine the lawfulness of the*

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93 de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed, 1995) at p. 251.

94 *Ibid*, pp. 249-250.

> *acts and decisions and orders of the Executive, tribunals and other officials exercising public functions, and to afford protection to the rights of the citizens. Legislation which deprives them of these powers is inimical to the rule or supremacy of the law….*
>
> *The view is widely held that "the proper tribunals for the determination of legal disputes in this country are the courts, and they are the only tribunals which, by training and experience, and assisted by properly qualified advocates, are fitted for the task". [footnote omitted]*[95]

In *R. v. Hull University Visitor, supra*, the House of Lords put the matter this way:

> *In my judgment the decision in Anisminic …rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires. Thenceforward it was to be taken that Parliament had only conferred the decision making power on the basis that it was to be exercised on a correct legal basis: a misdirection in law in making the decision therefore rendered the decision ultra vires. Professor Wade considers that the true effect of the Anisminic case is still in doubt…. But in my judgment the decision of this House in O'Reilly v. Mackman … establishes the law in the sense that I have stated. Lord Diplock … stated that the decision in Anisminic:*
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> > *'…has liberated English public law from the fetters that the courts had theretofore imposed on themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law committed by them within their jurisdiction. The breakthrough that Anisminic made was the recognition by the majority of the House that if a tribunal … mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported "determination", not being a "determination" within the meaning of the empowering legislation, was accordingly a nullity.'*
>
> *Therefore, I agree … that in general any error of law made by an administrative tribunal or inferior court in reading its decision can be quashed for error of law.*[96]

In sharp contrast to Canadian law, the English jurisprudence discloses no hint of existential "tension" about the proper role of the courts with respect to questions of law, even in the face of a full privative clause. American scholar Bernard Schwartz described *Anisminic* as "an unprecedented decision in a constitutional system whose foundation stone is Parliamentary

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95 *Ibid*, p. 231.

96 To similar effect, see *Boddington v. British Transport Police*, [1999] 2 A.C. 143 (H.L.).

supremacy".[97] The English cases concede that questions of law are not always simple to identify; however, once a question is so characterized, the proper standard of review is always correctness. One detects in the English cases the notion that deference on questions of law might be tantamount to what Lord Hewart described as "administrative lawlessness".[98]

Like questions of law, questions of procedural fairness are also reviewed on a correctness standard. Any other question – except perhaps questions arising under European Community law[99] - is subject to a standard of "rationality", as defined in *Associated Provincial Picture Houses Ltd. v. Wednesbury*, [1948] 1 K.B. 223 and the cases that have followed it.[100]

From a Canadian law reform perspective, there is no constitutional impediment to adopting the English approach by effectively "legislating" a correctness standard for all questions of law arising either with respect to specific tribunals, or generally on statutory appeal or judicial review to the courts.

The United States

In many respects, Canadian administrative law regarding the standard of review has more in common with United States law than it does with English law. A recent American law review article by Smith[101] suggests that the law of the United States with respect to the standard of review bears two striking similarities to Canadian law. First, American courts accept the notion of curial deference to administrative agencies on questions of law. Canadians will also take comfort in the second similarity - namely that in America, as in Canada, the law is less than clear about when such deference is appropriate.

Smith suggests that, until 1984, American courts essentially "pick" between two seemingly contradictory US Supreme Court decisions. One line of authority flowed from the US Supreme

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97 Schwartz, *Anisminic* and Activism – Preclusion Provisions in English Administrative Law" (1985), Admin. L.R. 33 at p. 33.

98 Lord Hewart, *The New Despotism* (1929), p. 6.

99 It has been suggested "there is a material difference between the *Wednesbury* and *Smith* grounds of review and the approach of proportionality applicable in respect of review where convention rights are at stake": *Reg. (Daly) v. Secretary of State for the Home Department*, [2001] 3 All E.R. 433, at paras. 26-27, per Lord Steyn.

100 See generally de Smith, *Judicial Review of Administrative Action*, ch 13.

101 Smith, "Comparing Federal Judicial Review of Administrative Court Decisions in the United States and Canada" (2000), 73 Temple L. Rev. 503. It should be noted that Mr. Smith's anaysis of Canadian law is somewhat incomplete. A review of the many of the cases and articles referred to in his paper, however, suggests that his review of American jurisprudence is much more sound.

Court's 1944 decision in *NLRB v. Hearst Publications*, where the court held that a Labour Board decision regarding whether specified persons were "employees" under the Act "is to be accepted if it has warrant in the record and a reasonable basis in law". A second line of authority would rely on the same court's decision only three years later in *Packard Motor Car Co. v. NLRB*, where the court reviewed a Board decision regarding whether a different group of persons were "employees" on a correctness standard without even referring to *Hearst* or the notion of deference.[102]

American scholars have suggested that the court's 1984 decision in *Chevron v. National Resources Defence Council* finally selected the "*Hearst* approach" over the "*Packard* approach". *Chevron* concerned judicial review of an Environmental Protection Agency decision interpreting the term "stationary source" in its enabling statute. In upholding the EPA's decision, the court announced an approach to judicial review that appears to be a unique mix of the present English and Canadian approaches:

> *When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute....*
>
> *Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency..... We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer....*[103]

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102 Smith, *supra*, at pp. 526-528.

103 *Chevron v. National Resources Defence Council*, 81 L. Ed. 2d 694 (1984) at pp. 702-04. It should be noted *Chevron* did not involve a privative clause. The governing *Administrative Procedures Act* is a federal statute expressly stating that "the reviewing court shall decide all relevant questions of law". In US law, the only references to privative clauses the author has located have arisen in state legislatures. One law review article suggests that, while the law is unclear on the point, the total preclusion of judicial review would be regarded by US courts as a violation of the Constitution: Schwartz, *Anisminic* and Activism – Preclusion Provisions in English Administrative Law" (1985), Admin. L.R. 33 at p. 35.

The *Chevron* test, which has elicited scholarly comment from numerous esteemed commentators[104], is an interesting mixture of Canadian law and English law. Like the law of Canada, the court in *Chevron* founds deference on the notion of legislative intent. Unlike Canadian law however, the test is not based on the general question of who the legislator felt was "better suited to answer the question", but rather: does the question, on the merits, have one clear answer? If the answer is yes, the court answers it. If the answer is "no", the matter is seen as one for the discretion of the agency, and deference is granted.[105] The court does not appear to trouble itself particularly with calibrating the exact "degree of deference owed".

In June, 2001, the US Supreme Court issued its decision in *United States v. Mead Corporation.*[106] Judging from the majority and dissenting opinions, *Mead* is the most significant American administrative law decision on the standard of review since *Chevron*. For purposes of this paper, *Mead* is of interest because it emphasizes again how the absence of clearly expressed legislative intent can create significant complications in the law. In *Mead*, the majority endorsed *Chevron*, but went on to conclude that deference may be appropriate even where Congress has not created an ambiguous provision. In a paragraph that bears striking similarity to Canadian decisions, the majority held:

> *When Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," Chevron, 467 U.S., at 843—844, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute…. But whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered. "[T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,' … "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer …." The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position…. The approach has produced a*

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104 Two of whom went on to sit on the US Supreme Court: see Scalia, note 1 above; and Breyer, "Judicial Review of Questions of Law and Policy" (1986), 38 Admin. L.R. 363.

105 The American approach bears some similarity to the approach suggested by Sopinka J. in *Paccar*, and applied by the Court in *Dell Holdings* (1997), suggesting that the Court need only examine "deference" issues if the decision is "incorrect". That approach, however, has been rejected in the overwhelming majority of Canadian decisions.

106 *United States v. Mead Corporation* (June 18, 2001, unreported, Cornell Law Website).

> *spectrum of judicial responses, from great respect at one end ("substantial deference" to administrative construction), to near indifference at the other (interpretation advanced for the first time in a litigation brief)….*

For the majority, the above paragraph was necessary to recognize statutory diversity. The majority stated:

> *Although we all accept the position that the Judiciary should defer to at least some of this multifarious administrative action, we have to decide how to take account of the great range of its variety. If the primary objective is to simplify the judicial process of giving or withholding deference, then the diversity of statutes authorizing discretionary administrative action must be declared irrelevant or minimized. If, on the other hand, it is simply implausible that Congress intended such a broad range of statutory authority to produce only two varieties of administrative action, demanding either Chevron deference or none at all, then the breadth of the spectrum of possible agency action must be taken into account. Justice Scalia's first priority over the years has been to limit and simplify. The Court's choice has been to tailor deference to variety. This acceptance of the range of statutory variation has led the Court to recognize more than one variety of judicial deference, just as the Court has recognized a variety of indicators that Congress would expect Chevron deference.*

For his part, Justice Scalia noted that "we will be sorting out the consequences of the *Mead* doctrine … for years to come."

Mead reinforces this paper's theme that, while there will always be complications in the law regarding the standard of review, legislators can go a long way to reduce those complications – and thus reduce expense to parties and courts – if they make their intentions clear.

8 OPTIONS DISCUSSION

The first part of this paper devoted significant attention to the underpinnings, tensions and complications attendant on the law regarding the standard of review in administrative law. That discussion was not undertaken for mere academic interest. It has arisen from the very practical reality that each day in this province, lawyers are required to apply this complex area of law in providing advice to their clients. Courts, in turn, are required to apply it in resolving the disputes arising before them. It follows that a detailed examination and analysis of this area of Canadian law, together with the English and American authorities, has been a necessary precondition to any meaningful discussion of potential law reform. This has been all the more important for the purpose of this background paper, as the preferred choice of law reform may turn on whether one accepts as accurate the author's assessment of the law, or its complications.

Having discussed "the law" at length, the discussion naturally turns to whether or how legislators might intervene to reform this area of law. In outlining the alternatives discussed below, the author has striven to avoid "recommending" any particular option over any other. This said, it is recognized that – strive as one might to avoid it – the author's own views may, from time to time, creep into the manner in which alternatives are described or discussed. The author can only provide the reader with the assurance that he has done his best to ensure that the discussion is a broad, reasonable and helpful. One significant advantage to the Administrative Justice Review is its invitation to interested persons to offer other alternatives in the event that important options have been missed.

Several options for reform are discussed below. In keeping with the purpose of this paper, the following sections outline some of the underlying assumptions that might be cited to support the specific options. It is for the reader to decide whether those assumptions are in fact sufficiently supportable to justify the pursuit of any particular option. It is also important to note that there may well be additional options or sub-options for consideration, and it is expected that such options will be advanced and refined as the consultation phase of this process unfolds.

Lessons learned from the existing jurisprudence

Any reform process must be guided by a number of key lessons learned from the jurisprudence. The key lessons are set out below.

Need to respect constitutional limitations

The first lesson flows from the constitutional imperative. Subject to rejecting the notion of privative clauses and adopting the English approach of having all questions of law reviewed for correctness, the constitutional imperative means that legislation can never totally remedy the complexity in this area of the law. As a result of *Crevier* and its progeny, full privative clauses can never totally eliminate complex and divisive arguments about "jurisdictional" questions. However, experience has shown that privative clauses do generally simplify the resolution of these questions. Full privative clauses render it much more likely that courts will respect legislative intent favouring deference. Moreover, the presence of full privative clauses means that the courts have only two standards of review to choose from: "correctness" and the "patently unreasonable" test. The author is not aware of any case in which the Supreme Court of Canada, or any other court, has applied the "reasonableness *simpliciter*" test, or any other standard of review on the "spectrum" in cases involving a full privative clause.

Legislative intent best achieved when legislators really grapple with the issue, as part of overall institutional design

The second lesson is that simplifying the law for parties and courts entails a corresponding responsibility on legislators to confront for themselves, on a more regular basis than they do now, the very questions that courts presently struggle with: how much deference, if any, ought to granted to the administrative tribunal in question, and in what areas?

Just as courts struggle to answer these questions, legislators will not always answer them easily either. However, the decision by legislators to confront these issues carries significant benefits. It enhances democratic values by replacing the sometimes fictional search for legislative intent with a real and tangible expression of such intent. It simplifies the law for courts and litigants, thus reducing cost and complication, and making litigation more effective. Importantly, it also forces legislators to think more carefully about the fundamental purpose of the tribunal and the implications of that purpose for institutional design. Where legislators determine that an administrative tribunal serves "core values", it will often undermine those values to have the tribunal's decisions regularly and easily challenged in the courts. Thus, the decision about the standard of review will necessarily force legislators to think about critical antecedent questions such as whether that the tribunal has the jurisdiction, procedures, qualifications, expertise and appointments necessary to carry out its function effectively.

To be specific, legislators need to be direct and creative

The third lesson is that it is no longer sound to assume that legislative intent is adequately expressed by creating a "right of appeal" versus "judicial review", or by expressing the grounds of appeal or judicial review as "on a question of fact" or "question of law". Legislative drafting must be more creative, and more direct. While there are many possibilities, two such possibilities are given below:

> Example A: Privative clause
>
> (1) Decisions of the Board are final and conclusive, and are not open to judicial review unless they are patently unreasonable.
>
> Example B: Statutory right of appeal
>
> (1) A person aggrieved by a decision of the Board has a right of appeal on a question of law to the British Columbia Supreme Court/Court of Appeal
>
> (2) On appeal, the standard of review for questions of law alone is correctness; for all other questions, the standard of review is whether the decision is patently unreasonable.

Examples "A" and "B" would both break new ground in the enactment of tribunal legislation by actually spelling out the relevant standard of review for the related question.

Example "A" relies on the court's statement in *Pushpanathan* that the words "final and conclusive" should be given full privative effect. The reference to "patently unreasonable error" is included to place that intention beyond doubt. "Jurisdictional" review is not mentioned because the *Crevier* principle, which authorizes review for jurisdictional errors (including procedural fairness) on a correctness test, is necessarily implicit in the clause, and because the legislator is taken to know the principle from *CUPE* that courts ought not to be alert to brand as jurisdictional that which may doubtfully be so.

Example "B" discloses that legislation purporting to grant rights of appeal to courts on questions of law can never be drafted in such fashion as to eliminate the difficulty in seeking to distinguish between questions of law and questions of fact. To this extent, *Southam's* direction that courts must seek to distinguish between law and fact by asking whether "a particular set of circumstances is apt to be of much interest to lawyers and judges in the future" will always have to be confronted, just as it has to be confronted in England. This does not, however, make the reform exercise pointless. As Example B illustrates, once the court concludes that the question is not a question of law alone, the standard of review is legislatively decided. Instead of having to apply a lengthy pragmatic and functional approach to even determine the standard of review for the particular issue, and then being concerned with the "spectrum" of review standards, the legislator tells the court what standard is to be applied after the threshold has been crossed. Because of the difficulty many courts have in meaningfully distinguishing between "unreasonable" and "patently unreasonable" error, the more familiar "patently unreasonable" test was selected in the example above.

If legislators want to ensure deference, they should look beyond privative clauses alone

The final lesson learned from the jurisprudence is that, particularly where legislators desire the tribunals they create to be granted curial deference, they must give special attention to matters beyond the wording of the privative clause. While courts have not fully defined what they mean by "expertise", the cases support the position that legislative attention to matters such as the qualifications for board membership and the security of tenure of members will – over and above their functional purpose - reinforce the legislator's view that it should be exceptional to identify an issue as "jurisdictional". In some cases, "qualifications" are addressed in the tripartite structure of some tribunals, such as the Labour Relations Board or the British Columbia Review Board.

However, as the author has noted elsewhere,[107] legislators have begun to experiment with other interesting examples of such clauses. While somewhat broadly worded, section 15(2) of the BC Benefits (Appeals) Regulation provides ready inspiration for merit-based provisions in administrative statutes:

> 15(2) To be eligible for appointment to the board, a person must have
>
> (a) knowledge of the principles of administrative law, or
>
> (b) experience with income security programs, appeal or arbitration boards or commissions or with health, education or community programs.

This is not to say that matters such as qualifications and the appointments process are not critical issues in their own right. They are, however, particularly critical where the legislator intends to create a board whose decisions will discourage litigation.

No legislative reform?

Having discussed the possibility of law reform, it is important to emphasize that preserving the status quo is one option available to government. The "status quo", in this context, means declining to engage in any substantial law reform regarding the standard of review. Support for the status quo would be based on one or more of the following propositions:

- The law with respect to the standard of review in administrative law is not so complicated and uncertain as to warrant law reform.
- Even if the law with respect to the standard of review is exceptionally complicated and uncertain:
  - It does not result in sufficient problems in enough cases to justify law reform.
  - It is questionable whether even law reform can effectively reduce the complication in enough cases to make a difference.
  - The law's complexity is a good thing, and legislatures should not attempt to simplify what must in each case, and for each issue, be a "nuanced" application of the pragmatic and functional approach that can only properly be determined by the courts.

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107 Falzon, *"Case Comment: Ocean Port Hotel v. British Columbia Liquor Appeal Board"* (November, 1999, Continuing Legal Education), p. 17.

- While the law is complex today, the standard of review will, over time, become sufficiently clear and settled with regard to a majority of tribunals, rendering academic the need for law reform.[108]

The case against this option would likely be based on one or more of the following propositions:

- The law is exceptionally complex and difficult to apply.
- While a certain degree of complexity will always be with us owing to the imperatives of s. 96 the *Constitution Act*, 1867, creative means do exist for legislators to meaningfully simplify the law for parties and courts.
- Any "benefits" of the nuanced approach are outweighed by the cost, unpredictability and complexity that presently attends the law where legislation is silent or ambiguous about the standard of review. Because the very purpose of the test is to determine legislative intent, it is desirable as a matter of policy for the legislature to express that intent clearly, even if the exercise becomes less "nuanced" than the "pragmatic and functional" approach.
- The problem is, in practice, a significant one for parties and courts. It is not likely to sort itself out in the near future.

The last point implicitly asks the question: how big a problem is this *really*? That very question has been raised by some tribunal members themselves, whose day-to-day concerns and priorities are often far removed from the question of the standard of review on any potential appeal or judicial review. With respect to this question, the Workplan setting the Terms of Reference for this paper states:

> *The standard of review is one of the most (if not the most) costly and time-consuming issue involved in preparing for, arguing and deciding a judicial review or statutory appeal to the Court. Each year, many thousands of hours of preparation time and court time are spent analyzing an extraordinarily large*

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108 This appears at least to be the preliminary position of the British Columbia Securities Commission, whose decisions have been subject to extensive litigation over the years, which litigation has produced what the Commission regards as a sound status quo with respect to its powers and the law regarding the standard of review of its decisions. The Securities Commission is one of those tribunals to which, despite the right of appeal, courts have granted curial deference in recognition of expertise. Whether legislative recognition of that expertise would be appropriate by way of a full privative clause may be a question the Commission wishes to address in any comment it provides on this report.

> *number of judicial authorities which have, as Professor Jones has noted, only "increased uncertainty" in the litigation process.*
>
> *In many hearings (and in many judgments), the standard of review occupies more time and expense than any other issue....*

That the standard of review is not of day-to-day concern to administrative tribunal members does not, of course, mean that tribunal chairs and their legal counsel will be unaware of the legal costs attendant on preparing for and arguing the issue. Nor does it necessarily reflect the difficulties that members of the Bar experience in providing legal advice on the question, or the difficulties courts experience in seeking to resolve it. Because the standard of review is a necessary threshold question in every case, it may be reasonable to conclude the large numbers of law review articles commenting on the issue, and the judicial decisions struggling with the question, reliably indicate that the issue is real, and widespread.

It will nonetheless be extremely useful to ascertain from those members of the Bar who practice in the area whether and to what extent they experience unnecessary complication in the law today, and to what extent they regard the reform of the law in this area as a legitimate issue for legislative action. Because this latter question cannot properly be answered without proper examination of the alternatives for law reform, it is to those alternatives that the discussion turns next.

The mechanics of reform

With respect to the mechanics of reform, three general approaches are possible. These include:

- Enact a generic provision creating one standard of review for all cases. For example, a "patently unreasonable" test for all decisions made by all tribunals, or alternatively a "correctness" test for all questions of law decided by tribunals, and "unreasonableness" for all other questions.
- Enact a generic provision which articulates the standard of review for various questions in a fashion that is presumptively inclusive of all tribunals, subject to exceptions listed in a schedule.
- Amend each specific statute, or only certain "problem" statutes, to clarify the standard of review applicable to that tribunal, or to specific decision-making powers of the tribunal.

The selection of any particular option may depend on one's preferred policy direction regarding standard of review legislation. The options are considered below, and various "mechanics" options are integrated with them to facilitate discussion.

Correctness review

On the English approach, no curial deference is granted on questions of law, but deference is granted on questions other than questions of law. A Canadian legislative example akin to the English approach is found in 672.78(1) of the *Criminal Code*, which governs appeals to the Court of Appeal from the British Columbia Review Board:

> 672.78(1) The court of appeal may allow an appeal against a disposition or placement decision and set aside any order made by a court or Review Board, where the Court of Appeal is of the opinion that:
>
> (a) it is unreasonable or unsupported by the evidence,
>
> (b) it is based on a wrong decision on a question of law, or
>
> (c) there was a miscarriage of justice.[109]

In contrast to the situation with privative clauses – where legislation can only go so far to insulate tribunals from judicial review - there is no constitutional impediment to inviting such review by legislating review for correctness. Depending on the policy orientation of the legislator, a number of options are possible, the first two of which may be framed either in a "pure" form, or as a proposition subject to exceptions:

- Wholesale adoption of the English approach: This model entails rejecting the position that curial deference on legal questions is appropriate, whether on judicial review or statutory appeal. It entails adopting the position of the English Courts that curial deference should never be granted on questions of law. While this approach would have the benefit of clarity and simplicity, its implicit rejection of arguments favouring tribunal specialization and finality would represent a radical departure from Canadian law.
- Focus on statutory rights of appeal: This model entails rejecting the Supreme Court of Canada's notion that a statutory right of appeal should be reduced only to a "factor" in determining of the standard of review. This approach would be based on the policy decision that because judicial review is always available, the decision to create a right of appeal to courts on a question of law must mean that the legislator rejected the notion of curial deference on questions of law, and invited courts to exercise their ordinary appellate role. This approach would have the disadvantage of requiring a wholesale review of statutes where such appeal rights are set out. However, its primary advantage

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109 This provision, enacted in 1992 to govern appeals from Courts and Review Boards, is identical to s. 686(1)(a) which has long governed conviction appeals in criminal law. It has long been clear that this language means questions of law are reviewed for correctness, and curial deference is granted on all other questions.

would be in rationalizing and clarifying the law, and forcing the legislature to ask whether many existing appeal rights are in fact necessary.

- Tribunal by tribunal review: The third approach, which could well accompany the second, is to review all the tribunals covered by this review process, and to ask whether curial deference on legal questions decided by that tribunal ought to be granted even where the only remedy is judicial review. Thus, the legislator itself, rather than the court, would decide when the correctness test applies to questions of law based on the appropriate balance between factors such as the need for finality, the interests at stake in the legislative scheme, and the function and intended expertise of the board. On this approach, tribunals not entitled to deference on legal questions would be identified and their legislation clarified. Tribunals entitled to deference would be granted express privative protection, discussed below. Tribunals where the legislature prefers the judicial "status quo" would be unchanged.

- "Correctness" on questions other than questions of law: It has been necessarily implicit in this discussion that, as in the English approach, an administrative tribunal acting according to law will normally be granted deference on questions of fact, mixed fact and law, and discretion. The manner in which deference on such questions might be expressed will be discussed in the next section. The point here is that it is open to legislators to extend correctness review beyond questions of law. It is, for example, open to provide that "correctness" is the test for all questions of law and mixed law and fact, leaving deference only for questions of primary fact. It is also open to the legislator to provide for an appeal by way of rehearing or trial *de novo*, which are more common in administrative appeals than they are in judicial appeals.

Curial deference

The other alternative for legislators wishing to clarify the matter for parties and courts is to legislate deference, subject to the constitutional limitations discussed above.

Within constitutional constraints, the mechanics of legislating deference are relatively clear from the caselaw. First, a full privative clause is necessary to carry out legislative intent in favour of deference: "partial" privative language is not particularly helpful. Second, the legislator ought to give attention to matters beyond the privative clause that reinforce the specialized composition and qualifications of tribunal members. Third, legislators ought to consider plainly stating the standard of review by using the words "patently unreasonable", or whatever other language accurately expresses their intent.

As with correctness review, a number of possible legislative approaches are possible, including the following:

- Blanket deference in all cases, whether appeal or judicial review: Such an approach is possible. Realistically, however, it would blur beyond recognition the distinction between appeal and judicial review.
- Blanket deference on judicial review: Pursuant to this model, the legislature might enact a general statutory provision to this effect:

  > (1) A court shall not grant declaratory relief, or relief in the nature of *certiorari* unless the decision of a board or tribunal subject to this statute unless the decision is patently unreasonable.

  The argument in favour of this model would be as follows. First, the philosophical arguments advanced in the *National Corn Growers* judgment were correct: most legal questions do not have a uniquely correct answer, and it is consistent with the rule of law to allow administrative tribunals to answer all such questions, including legal questions, with finality, unless a court concludes they are irrational or incorrect on a question of jurisdiction. Second, since the very purpose of creating administrative tribunals is to act as an alternative to courts, it makes sense to discourage litigation, and to encourage parties to put their best foot forward at the tribunal level. Third, such a clause would greatly simplify the analysis for cases that do go to court because it would limit the occasions when questions will be labeled as "jurisdictional". Fourth, a full privative clause means that, analytically, only two possible standards of review to be concerned with, and the "correctness" standard will only apply to questions of jurisdiction. Fifth, a decided legislative policy in favour of deference will act as a beneficial discipline for legislators to ensure that (a) the tribunal is truly necessary; and (b) care will be taken to ensure that the tribunal's members are of the highest calibre. Sixth, boards which raise exceptional considerations could be excluded from this approach. Seventh, it could be limited to the administrative tribunals subject to the present review, thus excluding other tribunals, government ministries and local governments.

  Those opposing this model might do so on one of three grounds. First, based on the English approach, it might be argued on philosophical grounds that while certainty is a good thing, this sort of certainty is not: legislators ought to resist a legislative presumption that excludes courts from providing the best answers to legal questions arising before them. Second, it might be argued that certainty makes bad public policy - that it is simply not possible or desirable to legislate a single approach to the standard of review that

takes into account the diversity of tribunals, and we should therefore retain the status quo as articulated by the Supreme Court of Canada. Third, some might take the somewhat cynical view that, despite conscious and considered law reform requiring deference, and the legislator's reliance on the caution in *CUPE* against unnecessarily labeling questions as "jurisdictional", courts will ignore the caution in order to preserve the judicial role as much as possible.

- Tribunal by tribunal review: As discussed in relation to the "correctness" option above, the third alternative is to reject the idea of a "presumed" standard of review, and simply to proceed with a rigorous review of each of the boards captured by this review. The decision whether to enact a privative clause, a correctness clause or retain the status quo would be made, on a case by case basis, in conjunction with the decision whether to continue with or create statutory rights of appeal.
- Expressing curial deference in legislation: The examples used in this paper have utilized the patently unreasonable test, rather than the reasonableness *simpliciter* test, to express curial deference, whether the issue is one of fact, law or discretion. This has been done in recognition of the vagueness of the intermediate test, and in recognition of the difficulties that have attended application of the English *Wednesbury* test. This said, it is certainly open to the legislature to articulate a "reasonableness" standard of review if it believes the patently unreasonable test unduly limits the scope of review.

The special case of appeals directly to the Court of Appeal

No law reform discussion about whether and how to legislate the standard of review from decisions of administrative tribunals would be complete without consideration of those tribunals whose decisions are subject to appeal, but where the appeal is directly to the Court of Appeal rather than to the Supreme Court. Boards falling into this category include the Expropriation Compensation Board, the Securities Commission, and the Commercial Appeals Commission. Their decisions may be appealed directly to the Court of Appeal with leave of the court.[110] This is in contrast, for example, to decisions of the British Columbia Marketing Board and the Forest Appeals Commission, which may be appealed to Supreme Court as of right on a question of law, and beyond that to the Court of Appeal with leave.[111]

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110 *Expropriation Act*, R.S.B.C. 1996, c. 125, s. 28(1); *Securities Act*, R.S.B.C. 1996, c. 418, s. 167(1); *Commercial Appeals Commission Act*, R.S.B.C. 1996, c. 54, s. 20.

111 *Natural Products Marketing (B.C.) Act*, R.S.B.C. 1996, c. 330, s. 9; *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, s. 14.

Appeals directly to the Court of Appeal occupy an interesting middle ground between an ordinary statutory appeal from a tribunal to the Supreme Court and judicial review protected by a privative clause. On one hand, such clauses may be seen as having partial "privative" effect since they contemplate only one level of review by a provincial superior court. While the constitutional right to seek judicial review in Supreme Court remains theoretically available in such cases, it is exceptional for a court to entertain such a Petition[112], even if a Court of Appeal refuses leave to appeal.[113] The requirement to grant leave to appeal may be seen as reinforcing this "privative" effect, though in practice leave is only refused for cases "without merit or moment".[114] On the other hand, the standard of review to be applied by the Court of Appeal once leave to appeal is granted is not entirely clear. There is conflicting case law as to whether the leave to appeal requirement itself is a factor in favour of or contrary to deference.[115] The scope of the court's role on appeal in reviewing questions of law, fact and discretion is not entirely clear.[116] Nor is the outcome of the pragmatic and functional approach particularly predictable in any particular case.

For purposes of law reform, two points arise from this discussion. First, the creation of appeals directly to the Court of Appeal from the decisions of certain administrative tribunals is an important tool for legislators to consider in setting where the finality of administrative tribunal decisions is important, but where significant interests may also be at stake. Second, the creation of such an appeal is only part of the equation: legislative clarification regarding the scope of appeal and the standard of review when leave to appeal is granted may at once assist courts and parties contending with these questions, and ensure that legislative intent is properly carried out.

A limitation period for judicial review

Appeal rights almost always arrive with limitation periods attached. Because the right of appeal is a creature of statute, a missed limitation period terminates the right of appeal. Even where

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112 *Delmas v. Vancouver Stock Exchange*, [1995] B.C.J. No. 2449 (C.A.).

113 Brown and Evans, *Judicial Review of Administrative Action in Canada* (2001) at pp. 3-15, 3-16.

114 *Delmas v. Vancouver Stock Exchange*, [1995] B.C.J. No. 2449 (C.A.).

115 In a 1998 decision dealing with the Expropriation Compensation Baord, the Court of Appeal relied on the requirement to obtain leave as being a factor in favour of curial deference: *Actton Petroleum Sales Ltd. v. British Columbia (Minister of Transportation and Highways)*, [1998] B.C.J. No. 1244 (C.A.). However, this does not appear entirely consistent with the majority's view in *Pushpanathan* which stated that, to the extent that a Court's consideration of the issue is based on its "general importance" (which is, of course, one of the criteria for granting leave), the case for deference diminishes: (1998), 160 D.L.R. (4th) 193 (S.C.C.) at pp. 217-218.

legislation expressly grants discretion to the appellate body to accept "late" appeals, missing the appeal period is usually the source of significant heartache.

The seriousness with which courts take appellate limitation periods is reflected in the exhaustion of remedies doctrine in administrative law. While it is trite law that the existence of an adequate and available right of appeal to a tribunal or court will almost always lead a court to refuse relief on judicial review, such relief is also refused where the appeal period was not exercised and has now expired. As noted by Brown and Evans:

> *...where appeal rights exist, including an appeal by way of stated case, the courts have usually declined to grant a remedy pursuant to an application for judicial review, notwithstanding that the time for appeal may have expired or that leave to appeal has been denied.*[117]

Thus, where the legislature has created a statutory right of appeal to a court, the indirect result has been a "*de facto*" limitation period on the ability to challenge that decision in court. Like the leave to appeal requirements discussed in the previous section, this *de facto* limitation period may be seen as having a form of "privative effect". All of which leads to the question whether the legislator ought to consider more directly the question whether or to what extent limitation periods are appropriate for judicial review itself.

Brown and Evans observe that while there is older authority for the position that a limitation period, like a privative clause, is ineffective to oust the court's jurisdiction to grant judicial review, such a view would only prevail today where the limitation is so short as to deny the applicant a reasonable opportunity to challenge the validity of the administrative action in question.[118] Canadian and English authority appear to support this view.[119]

As a matter of constitutional law, legislators do have the option of creating a judicial review limitation period. Such a limitation period may be general or specific. Depending on the length of the limitation period, it may or may not recognize the court's right to grant leave to file a late application in exceptional circumstances.

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116 *Saunders Farms Ltd. v. British Columbia (Liquor Control and Licensing Branch)*, [1995] B.C.J. No. 82 (C.A.) at paras. 31-39.

117 Brown and Evans, *supra*, pp. 3-15, 3-16.

118 Brown and Evans, *supra*, pp. 5-6, 5-7.

119 *Wainwright School Division No. 32 v. C.U.P.E. Local 1606*, [1987] A.J. No. 712 (Q.B.); de Smith, *Judicial Review of Administrative Action* (1995, 5th ed), p. 236.

There are two policy arguments against a limitation period for judicial review. First, British Columbia has never had a limitation period, and courts have been able to satisfactorily deal with cases involving delay and prejudice.[120] Second, public law issues are so important that the citizen's access to the court should not be constrained by a limitation period.

The policy arguments in favour of a limitation period for judicial review are as follows. First, the use of limitation periods to govern and organize the assertion of legal rights is a familiar feature of the legal system. Certainty and finality are just as important in public law cases than they are in the private law. Second, finality may be more important in public law cases, particularly where the Legislature created an administrative tribunal designed to deliver "final" decisions that allow parties to get on with their lives with minimum uncertainty following the tribunal's decision. Third, while the court has discretion to refuse relief based on delay or prejudice, this discretion may do little to address the inconvenience, uncertainty and expense of having to prevail upon the court's discretion to grant the remedy. This is particularly so given the view that courts ought not to refuse relief based on delay without first hearing the merits.[121] Finally, the law has long accepted "de facto" limitation periods arising from statutory appeals, and it ought not to be offensive to do directly that which can be achieved indirectly.

As with the other options under discussion in this paper, it is open to legislators to consider such legislation either generally or on a tribunal by tribunal basis, and to define any such limitation period according to whatever period of time appears fair and reasonable.

9 CONCLUSION

This paper has sought to achieve two goals. The first goal has been to describe and comment upon the law governing the standard of review in administrative law in a way that will assist readers in formulating opinions as to whether this subject matter justifies the call for law reform. The second has been to outline possible options for law reform, so as to advance dialogue and debate as to the content of any such reform. While significant effort has been made to ensure that this paper is as objective as possible, it is recognized that any discussion of law, and administrative law particularly, is inevitably informed by one's own perspectives and experiences. For this reason, an open and comprehensive debate about the issues and options set out in this

120 See *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, ss. 8(1), 11.

121 *MacLean v. University of British Columbia Appeal Board* (1993), 109 D.L.R. (4th) 569 (B.C.C.A.).

paper will be essential to informing public policy prior to the development of White Paper recommendations.

As noted in the quotation from Mr. Justice Scalia at the outset of this paper, such an exercise is not for the faint of heart. However, it is hoped that, whatever the outcome, such discussion will in some way assist everyone who is called upon to participate in the administrative justice system.

The Statutory Powers and Procedures of Administrative Tribunals in British Columbia

A Background Paper

Prepared by

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for

Administrative Justice Project

Ministry of Attorney General

Victoria, British Columbia

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Preface

This background paper is one of several to be released as part of the Administrative Justice Project. The Project, initiated by the Attorney General, is a broad legal and policy review of the system of administrative justice in British Columbia. Its objectives are to ensure that:

- administrative agencies meet the needs of the people they serve;
- their administrative processes are open and transparent;
- their mandates are modern and relevant;
- government fulfills its obligations by providing the legislative and policy framework administrative agencies require to carry out their independent mandates effectively.

The Terms of Reference for the background papers are to ensure that:

- legislation is based, to the greatest extent possible, on a principled, consistent and clear articulation of the role and powers of administrative agencies;
- administrative agencies possess the procedural authority to respond flexibly, effectively and efficiently to resolve disputes by adjudicative or other means;
- compelling rationales exist for more than one "layer" of administrative appeal or review;
- courts and parties have clearer direction regarding the legislature's intention concerning matters such as the standard of review where a decision is challenged on judicial review or appeals.

The intent of this and the other background papers is to facilitate informed discussion about steps government can take to assist the work of administrative agencies. The papers provide a focus for this discussion and, it is hoped, will result in dialogue and debate within the administrative justice community. Comment will be taken into account by the Administrative Justice Project when it drafts a White Paper for release in early 2002. There will be a further opportunity for public input after the White Paper is released, before government decides on what steps it will take.

If the reader is interested, written comments may be forwarded to the author at the following address prior to April 15, 2002.

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EXECUTIVE SUMMARY

The administrative tribunal is a distinctive institution of our legal system. Neither court nor government department, the administrative tribunal is a servant of the Legislature itself – a creature of statute whose fundamental purpose is to take various actions or decisions, usually at arm's length from government and with less formality than courts, and always with utmost fidelity to the policy of the statute.

Just as public policy is diverse, so are the purposes and functions of administrative tribunals. Amid this diversity, the rule of law is a tie that binds all administrative tribunals. The rule of law requires that whatever powers an administrative tribunal might wish to exercise, it has only such powers as are expressly conferred or necessarily implicit in the governing legislation. The rule of law also includes the principle that, unless excluded by legislation, an administrative tribunal must accord procedural fairness to a citizen specifically and significantly affected by its decision or action.

The demands of the rule of law imply a corresponding onus on legislators to ensure that legislation fully and adequately describes the powers and procedural obligations of the administrative tribunals they create. The failure to do so completely, consistently, or at all carries serious implications. As expressed at page 13 of this paper:

> *Administrative tribunals should, as public service agencies, be spending as little time as possible resolving questions as to their substantive and procedural authority. Where such powers are inadequately or incompletely expressed, tribunals sometimes choose not to exercise those powers at all. On other occasions, they may resolve ambiguity by opting for more court-like solutions to problems, on the basis that they should play it safe. On yet other occasions, they may spend significant time, at hearings and in Court, addressing jurisdictional arguments. They may, in the end, spend time and money seeking to resolve issues that might have been avoided had the legislator anticipated the issues and provided appropriate guidance.*

The purpose of this discussion paper is to emphasize the important link between an administrative tribunal's powers and procedural obligations, and its ability to deliver its public service mandate in a fair, efficient and effective manner. As will be seen from the discussion that follows, the subject of statutory powers and procedures has received a great deal of attention and study both in Canada and elsewhere. Those studies universally reject the creation of a single, comprehensive code of tribunal powers and procedures, but they do propose a number of alternatives designed at once to enhance sound strategic thinking in tribunal legislation and ensure a proper balance between procedural fairness and effective, principled administration.

As the present discussion proceeds, readers are encouraged to consider the following questions:

- Why are the powers and procedures of administrative tribunals so important to the delivery of the public service functions they exercise?
- Are the current disparities that exist among the powers and procedures of administrative tribunals necessary and justified in light of their diverse mandates and public policy functions?
- What law reform processes have other jurisdictions used to review this issue, and what have been the results of those reviews?
- What are the principal options available to British Columbia legislators? In particular, should British Columbia create a Council on Tribunals and/or adopt statutory powers and procedures legislation? Should the individual powers and procedures of administrative tribunals be made by government, a Rules Committee or tribunals themselves?

It has been customary for law reform papers addressing this subject to advance specific recommendations for public comment. This paper takes a different approach, by taking a step back. Rather than proposing a specific course of action, this paper seeks to encourage discussion and debate by assisting readers to consider available law reform options for themselves, and to make their own recommendations to government. Following the receipt of public comment on this paper, the government intends to prepare a White Paper, which will propose specific recommendations.

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"[A] gram of prophylaxis is worth a kilogram of prerogative writs."

Prof. Harry Arthurs[1]

1 OVERVIEW: ADMINISTRATIVE TRIBUNALS

The body of law that we call administrative law is concerned with the principles governing persons and bodies exercising "governmental" or "public" power in relation to the citizen. This power is exercised primarily pursuant to legislation, the work product of the democratic process.[2]

Over the past five decades, administrative law has assumed much greater prominence in the law of Canada. Its increased prominence is the by-product of the expanding role that government itself has played in western society following the Second World War. The following passage from a Supreme Court of Canada judgment nicely emphasizes the ubiquitousness of regulation in modern society:

> *It is difficult to think of an aspect of our lives that is not regulated for our benefit and for the protection of society as a whole. From cradle to grave, we are protected by regulations; they apply to the doctors attending our entry to the world and to the morticians present at our departure. Every day, from waking to sleeping, we profit from regulatory measures which we often take for granted. On rising, we use various forms of energy whose safe distribution and use are governed by regulation. The trains, buses and other vehicles that get us to work are regulated for our safety. The food we eat and beverages we drink are subject to regulation for the protection of our health.*[3]

Regulation, and the use of public power it entails, has many faces. Public power is exercised by courts of law. It is exercised by ministers of the Crown and by officials within their ministries. It is exercised by local governments. It is exercised by self-regulatory bodies.

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1 H.W. Arthurs, "Recognizing Administrative Law" (1979), *Proceedings of the Administrative Law Conference* (University of British Columbia), p. 3.

2 I say "primarily" concerned, because the vast majority of administrative law cases concern persons exercising a statutory power. While this is a useful definition for purposes of this paper, it should be noted that the province of administrative law extends beyond persons exercising statutory powers, to officials such as ministers exercising common law "public" functions, and even private bodies acting without legislative underpinning but regarded as making a "public" decision: see *R. v. Panel on Take-overs and Mergers*, [1987] 1 Q.B. 815 (C.A.). For an extremely useful discussion of the outer boundaries of administrative law, see Groberman, "Administrative Law and Non-Statutory Bodies", *Administrative Law (1998)*, Continuing Legal Education, ch. 6.1.

3 *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at para. 136, per Cory J.

While the province of administrative law extends to all these bodies, this paper's attention focuses specifically on the group of entities that are neither ministers of the Crown nor courts; neither local governments nor Crown ministry officials. They are entities that are variously described as "independent administrative agencies", "administrative boards" and "administrative tribunals". The Administrative Justice Project refers to them as "administrative justice agencies", and describes them as follows:

> *Administrative justice agencies provide specialized forums for decision making and dispute resolution that are separate from day-to-day operations of government ministries. Like the courts, administrative agencies are expected to be impartial and fair. As an alternative to the courts, they are also expected to be more accessible, less costly and more able to reach a decision in a timely and effective manner.*[4]

Administrative tribunals have been defined as "distinctive institutions of the welfare state" that typically share four characteristics:

- They enjoy a measure of independence from the government department with overall responsibility for the policy area in which they operate. This means, at the very least, that the minister cannot direct their decision-making, and in turn is not politically accountable for their decisions under traditional principles of responsible government.
- They are specialized: they are associated with one or more specific public programs, usually within a single statute.
- They are meant to be effective and typically operate at the "sharp end" of the administrative process: that is, at the point where the program is applied to the individual.
- Their functions typically include making decisions that are sufficiently serious and specific in relation to the citizen as to attract the common law duty of procedural fairness.[5]

---

4 Administrative Justice Project, *Terms of Reference*, July 27, 2001. The "administrative tribunals" of particular concern in this paper are those tribunals that are part of the government's administrative justice project review, which are primarily "independent administrative tribunals": Terms of Reference, Schedules 1 and 2. This said, it is recognized that many of the matters discussed in this paper may have application to reform prospects for other legislative delegates, including Crown decision-makers and self-governing professions. While this paper may provide a helpful framework for the reforming the law regarding the standard of review in those areas, each of them raise unique policy considerations that may, for some, speak in favour of a different answer to the law reform questions posed in this paper.

5 See generally, Evans, Janisch, Mullan and Risk, *Administrative Law* (4th ed, 1995), pp. 12-20.

The public policy areas served by administrative tribunals are nearly as broad as those of government itself. As the Supreme Court of Canada has recognized: "In Canada, boards are a way of life. Boards and the functions they fulfill are legion."[6]

For the great breadth of modern administrative law, its roots run just as deep. Administrative law is the inevitable by-product of the Rule of Law, and two transcendent ideals it encompasses: (1) that those exercising public authority must act, and must be allowed to act, within the scope of their grant of authority; and (2) that where public power is directed toward the citizen, decision-makers must generally act in a fashion that is procedurally fair. These ideals are not judicial inventions. They are not matters only for lawyers. They represent a fundamental societal ethic. This is why the articulation, realization and reconciliation of these ideals have spawned significant debate outside the courtroom.[7] They are the very stuff of public policy.

Administrative tribunals are creatures of statute. This fact, and the public policy tensions inherent in finding the proper balance between procedural justice and effective administration, necessarily implies a prominent role, if not a responsibility, for legislators. The fundamental questions posed by this paper are whether policy-makers have consistently given sufficient attention to these questions in creating and enabling British Columbia's administrative tribunals and, if not, what legislative options are available to ensure that administrative tribunals effectively achieve their very important public purposes.

Despite the importance of such questions to the effective functioning of administrative tribunals, it has been observed that a "general interest in reforming the law of administrative [powers] and

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6 *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at para. 17.

7 For a useful summary of the competing tensions in this area, see Chief Justice McLachlin's Paper: "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999), 12 C.J.A.L.P. 171. See also the author's Discussion Paper for this Project concerning the "Standard of Review on Judicial Review and Appeal". The ongoing debate about how "the Rule of Law" should be defined and articulated might cause some readers to wonder whether it really is a notion worthy of being called a "fundamental societal ethic". To this legitimate question, one might respond first with the insight of Lord Reid, whose comments about the notion of "natural justice" apply equally well to the Rule of Law: "In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist": *Ridge v. Baldwin*, [1963] 2 All E.R. 66, Lord Reid at p. 71. In addition, it may be suggested that the Rule of Law is probably subject to such intense discussion precisely because its "primary colours" are fundamental and well-established; the debate is usually around the importance of each colour, what kind of picture to paint, and how to paint it.

procedures has captured legislative attention relatively infrequently".[8] By sponsoring the preparation of this background paper, the Attorney General of British Columbia has provided the opportunity for a meaningful and principled law reform discussion on the subject of statutory powers and procedures in British Columbia.

2 FOUR REALITIES THAT INFORM THIS PAPER

The matters under discussion in this paper have been canvassed from numerous perspectives in numerous common law jurisdictions. Those reviews, and reactions they have elicited, are canvassed in Part 3 of this paper. However, before turning to a comparative review, it will be useful to expand on the points just made by way of overview, and to outline four key realities that underscore this discussion paper.

Tribunals serve diverse public policy functions

The first reality that underscores this paper is that the label "administrative tribunal" can serve to mask the diversity of public mandates and functions assigned to these delegates of the Legislature.[9] This diversity can be illustrated by examining the mandates of four administrative tribunals that are with the scope of the Administrative Justice Project:

> Review Panels: *Mental Health Act*, R.S.B.C. 1996, c. 288
>
> > 25(1) A patient detained [in a mental health facility] is entitled, at the request of a patient or a person on the patient's behalf, to a hearing by a review panel...
> >
> > (2) The purpose of a hearing under this section is to determine whether the detention of the patient should continue because section 22(3)(a)(ii) and (c) continues to describe the condition of the patient.[10]
>
> Building Code Appeal Board: *Local Government Act*, R.S.B.C. 1996, c. 323
>
> > 693(6) If a dispute arises on the interpretation or application of the [building codes established by the minister] referred to in section 692, a party to the dispute may refer the question to the appeal board for determination.

---

8 Bryden and Gunn, The Canadian Law of Administrative Procedure (2000), unpublished, ch. 3, p. 4.

9 This point was repeatedly emphasized by tribunals themselves at the September 28, 2001 consultation workshop.

10 Collectively, subs. 22(3)(a)(ii) and 22(3)(c) require review panels to determine whether a person has a mental disorder, requires treatment in or through a designated facility to protect themselves or others, and will not go voluntarily.

> (7) The appeal board must determine any question of interpretation or application of the codes referred to in section 692.[11]

Farm Practices Board: *Farm Practices Protection (Right to Farm) Act*, R.S.B.C. 1996 c. 131

> 3(1) If a person is aggrieved by any odour, noise, dust or other disturbance resulting from a farm operation conducted as part of a farm business, the person may apply in writing to the board for a determination as to whether the odour, noise, dust or other disturbance results from a normal farm practice.[12]

Labour Relations Board: *Labour Relations Code*, R.S.B.C. 1996, c. 244

> 133(1) If, on application or complaint by any interested person, under section 14, this section or another provision of the Code or regulations, or on its own motion, the board is satisfied that any person has contravened this Code, a collective agreement or the regulations, it may, in its discretion, do one or more of the following:
>
> > (a) order a person to do any thing for the purpose of complying with this Code, a collective agreement or the regulations, or to refrain from doing any act, thing or omission in contravention of this Code, a collective agreement or the regulations.....[13]

The diversity reflected in these mandates reflects the diversity of public policy itself. The involuntary committal of certain mentally-ill persons, the creation and enforcement of building codes, the balancing of agricultural and urban interests and sound labour relations policy are all key areas of legislative concern. Each involves different public policy solutions, because each involves different communities, different interests and different statutory purposes. The decision to create an administrative tribunal within a particular statutory scheme is a statement that the Legislature intends the tribunal, first and foremost, to carry out the policy of the statute.[14]

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11 A typical dispute before this Board might arise where a local government inspector has refused a party a building permit: see for example: *Nancy Greene's Cahilty Lodge Ltd. v. Thompson Nicola (Regional District)*, [1996] B.C.J. No. 547 (S.C.).

12 "Normal farm practice" is defined in s. 1 of the Act to mean "a practice that is conducted by a farm business in a fashion consistent with (a) proper and accepted customs and standards as established by similar farm businesses under similar circumstances, and (b) any standards prescribed by the Lieutenant-Governor-in-Council." After hearing a complaint, a panel may either dismiss the complaint, or order the farmer to cease or modify the practice: s. 6.

13 Section 133(1)(a) is quoted only to provide a flavour of the LRB's subject matter jurisdiction. That jurisdiction is of course much more extensive: see for example the whole of s. 133, together with other provisions such as ss. 13, 17, 23 and 99.

14 This is probably the best explanation of the Court's statement in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)* 2001 SCC 52

Because statutory subjects, purposes and solutions may vary widely, it should come as no surprise that administrative tribunals, viewed as a whole, do not (and cannot) operate in a "cookie cutter" fashion.

The reality that the label "administrative tribunal" must not act as a substitute for critical thought regarding tribunal structure and operations has led Professor Ison to issue this caution regarding the generic study of administrative tribunals and administrative justice:

> *The term "administrative justice" has a pervasive homogenizing influence. Tribunals and other government agencies were created in the first place to achieve diverse goals through diverse structures and procedures. They were intended to differ from courts, and from each other. But "administrative justice" seems to inspire a demand for some common thread, some common bond, some common structure or process, or some common overview…*
>
> *I believe that the public interest is better served if "administrative justice" is perceived,* not *as a subject on its own, and* not *as a rationale for some controlling overlordship, but as a body of thought that can be drawn upon in the* design *of a particular system, such as income tax, social security, the regulation of road transport, or occupational health. It is in the* design *of such systems that notions of "administrative justice" can be used constructively, with a minimum risk of collateral damage. The damage that I fear is likely to come when notions of "administrative justice" are forced onto a system by people who have no overall responsibility for the design of that system, and who have made no study of the subject area.*[15]

The passages just quoted wisely recognize that tribunal reform should not be divorced from a deeper understanding of a particular tribunal's function within the enabling statute's factual and policy underpinnings.

It may, however, go too far to imply from this that administrative tribunals represent a wilderness of single instances, or that it would undermine public policy to explore, in a systemic way, the benefits of clarity and consistency in tribunal powers and procedures. While reformers and their critics have, for example, differed regarding matters such as how strongly process values should be emphasized across the wide spectrum of administrative tribunals, neither group has advocated arriving at final conclusions without considering the implications of reform proposals

---

at para. 24: "[Administrative tribunals] are, in fact, created precisely for the purpose of implementing government policy".

15 Ison, "Administrative Justice: Is it Such a Good Idea?", ch. 1 in Harris and Partington (eds) *Administrative Justice in the 21st Century* (1999) at pp. 26 and 33.

for each potentially affected tribunal.[16] The question of how far traditional process values should be emphasized in one or more administrative tribunals is ultimately a value judgment which the legislator is entitled to resolve for itself, and respecting which notions such as "cost-benefit analysis" do not necessarily provide a ready substitute[17].

Tribunals share common interests

All of which leads to the second reality underlying this paper: that despite the necessary diversity between administrative tribunals in British Columbia, there are common points of interest that justify the meaningful and systemic study of agency powers and procedures with a view to potential law reform.

One common point of interest between administrative tribunals is the question whether the *degree* of diversity attending their powers and procedures even reflects sound strategic planning and careful institutional design. Reference is made for example to the observation made by Sir Oliver Franks in the English context in 1957:

> *Perhaps the most striking feature of tribunals is their variety, not only of function, but also of procedures and constitution. It is no doubt right that bodies established to adjudicate on particular classes of case should be specially designed to fulfill their particular functions and should therefore vary widely in character. But the wide variations in procedure and constitution which now exist are much more the result of ad hoc decisions, political circumstance and historical accident than of the general application of clear and consistent principles.*[18]

Descending from theory to the concrete realities of individual statutes in modern British Columbia, one may question whether the imperative of "tribunal diversity" necessarily explains why, for example:

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16 It should be noted that even the oft-criticized McRuer Report (*Royal Commission of Inquiry Into Civil Rights* (1968) engaged in a comprehensive, statute by statute analysis of whether and to what extent its recommended "Statutory Powers Procedure Act" should apply.

17 Schwartz, "Cost-Benefit Analysis in Administrative Law: Does it Make Priceless Procedural Rights Worthless"" (1985), Admin L. Rev. 1 at pp. 13-14: "[Cost-Benefit Analysis] has about it a delusive aura of scientific objectivity that may be justified in the field of economics in which it began.... As a public-law tool, however, it is as subjective as the Benthamite 'felicific calculus' which was its primitive progenitor... What appears to be objective is really Benthamism in modern dress – and with a subjective vengeance".

18 Report of the Committee on Administrative Tribunals and Enquiries (July 1957), at para. 128.

- some tribunals that regularly hear evidence have the discretion to compel witnesses to attend before them, while others do not;[19]
- some have flexible quorum requirements, while others do not;[20]
- some tribunals have rule-making powers, while others do not;[21]
- the role of the tribunal Chair is addressed in some statutes, but not in others;[22] and
- some tribunals have specific authority to encourage and direct various forms of consensual dispute resolution, while the language of other statutes is silent on the question.[23]

This is not to suggest that all administrative tribunals labour under deficient legislation. As recognized below, two administrative tribunals in British Columbia have indicated that they see no need for any significant reform of their statutory powers and procedures. However, it is probably reasonable to conclude that important "powers" and "procedures" issues often not fully and comprehensively considered in the development of legislation. As recently as March 2001, Sir

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19 Take for example administrative tribunals dealing with individual liberty and which operate in an inquisitorial fashion. The British Columbia Review Board (*Criminal Code*, s. 672.5) and the Health Care and Care Facility Review Board (*Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996 c, 181, s. 29(9)) have express jurisdiction to compel testimony, while *Mental Health Act* Review Panels do not have this express power.

20 While the Forest Appeals Commission is entitled to organize itself into panels of one or more members (*Forest Practices Code Act*, R.S.B.C. 1996, c. 159, s. 195(1)), the Community Care Facility Appeal Board is not: *Community Care Facility Act*, R.S.B.C. 1996, c. 60, s. 15(6).

21 The Medical and Health Care Services Appeal Board, which hears appeals from Medical Services Commission decisions regarding medicare entitlement, is expressly empowered to "make rules governing practice and procedure for all appeals before the Board": *Medicare Protection Act*, R.S.B.C. 1996, c. 486, s. 44(1). This authority has not been conferred on other "health" related appeal boards, or indeed on many other appeal boards.

22 The very important question of the Chair's role is simply not addressed in most legislation: see Macaulay, *Practice and Procedure Before Administrative Tribunals* (1996), p. 38-149; in British Columbia, the matter appears to be addressed only on an *ad hoc* basis: see for example, BC Benefits (Appeals) Regulation, BC Reg. 271/96 (as amended), s. 16(1): "The chair of the board is its chief executive officer and is responsible for supervising and directing the staff of the board".

23 The *Farm Practices Protection (Right to Farm) Act* (s. 4) expressly contemplates the Board actively encouraging consensual dispute resolution. However, the legislation of other party-party tribunals, such as the Commercial Appeals Commission, is silent on the question, which potentially raises procedural fairness issues depending upon how proactive the tribunal wishes to be in encouraging consensual dispute resolution.

Andrew Leggatt, in an English law reform report, recognized that procedural reform of formal dispute resolution processes gives rise to a "common set of issues" and that "leaving procedural reform of tribunals scattered across a series of departments is impeding modernization" in England.[24] Administrative tribunals seeking to diligently carry out the public policy expressed in the statute may find that the failure to address these issues comprehensively has serious and adverse consequences indeed.

The serious consequences that can result from omission and inconsistency in legislation flow from the second common thread that binds administrative tribunals – namely, the Rule of Law. All administrative tribunals are statutory delegates. They exist within the legal reality that any excess of jurisdiction – for example, by sitting without a proper quorum – renders their decisions vulnerable on judicial review in the provincial superior courts. Such tribunals are, by and large, subject to the duty of fairness at common law.[25] While commentators may debate the desirability and scope of the courts' judicial review function[26], it is an undeniable reality that the Rule of Law, as defined by the courts, has significant implications for administrative justice reform.

Administrative tribunals should, as public service agencies, be spending as little time as possible resolving questions as to their substantive and procedural authority. Where such powers are inadequately or incompletely expressed, tribunals sometimes choose not to exercise those powers at all. On other occasions, they may resolve ambiguity by opting for more court-like solutions to problems, on the basis that they should play it safe. On yet other occasions, they may spend significant time, at hearings and in court, addressing jurisdictional arguments. They may, in the end, spend time and money seeking to resolve issues that might have been avoided had the legislator anticipated the issues and provided appropriate guidance.

Legislative supremacy

Legislative supremacy is the third key reality that informs this paper. Administrative tribunals are, by definition, creatures of statute. It thus stands to reason that legislators themselves have the

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24 "Tribunals for Users: One System, One Service", *Report of the Review of Tribunals by Sir Andrew Leggatt*, March, 2001, para. 2.27.

25 See for example, *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at para. 21: "All administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interest they must determine".

26 See generally, the Project discussion paper regarding the *Standard of Review on Judicial Review and Appeal* (December, 2001).

primary role and responsibility of defining the key powers and procedures applicable to the administrative tribunals of their creation.

The role played by courts

One of the most important features of administrative law has been the willingness of courts to step in and "supply the omission of the legislature" with respect to statutory powers and procedures[27]. It is long been the case, for example, that courts have intervened - where legislation is silent or ambiguous - to define the procedural obligations that tribunals must follow in order to ensure that the exercise of statutory power is "fair".[28] On occasion, courts have been prepared to go even further and imply particular *powers* that are not expressly stated in enabling legislation.[29] These instances of judicial creativity have arisen out of both practical necessity and a deeply embedded judicial ethic that procedural safeguards represent a critically important check on the potential abuse of statutory power.

Having assumed this role, the courts have always readily recognized that judicial policy choices are subject to the legislator's ultimate right to make the key "powers" and "procedures" decisions for administrative tribunals. It is still the case in Canada that, with a few exceptions involving tribunals dealing with personal liberty[30], legislative supremacy is alive and well with respect to the powers and procedures of administrative tribunals.[31] The legislation of other jurisdictions, the work of the numerous law reform projects in this area and the reactions they have all engendered tend to suggest that these are not just issues for Courts. Significant public policy issues lie at the heart of any discussion of statutory powers and procedures.

Legislative choices regarding statutory powers

One group of issues for legislators focuses on the core *powers* that administrative tribunals should have, either individually or in common, in order to operate effectively. For example, should administrative tribunals that find facts typically have the power to summon witnesses and punish for contempt? Should they have the power to dismiss claims or appeals summarily? Should tribunals engaged in party-party disputes typically have powers relating to "consensual dispute resolution" written into their enabling statutes? Should tribunals have the power to order

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27 *Cooper v. Wandsworth Board of Works* (1863), 14 C.B. (N.S.) 180 (C.P).

28 *Ibid.*

29 See *Ewachniuk v. Law Society (British Columbia)* (1999), 46 B.C.L.R. (3d) 203 (C.A.).

30 See *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307.

31 See also *Ocean Port Hotel*, *supra*, note 13.

discovery, or grant costs to the successful party? Should appellate tribunals have the power to stay the decision appealed from pending appeal? Should tribunals have a choice regarding panel size? Should the role of the chair be more carefully defined? Each of these questions requires a public policy choice to be made regarding the appropriate degree of legal authority to be exercised by the tribunal vis-à-vis those subject to the tribunal's mandate.

In an ideal world, those responsible for legislation would give these questions considered thought in respect of each administrative tribunal, and would treat like cases alike. The failure to do so may unduly fetter an administrative tribunal. It may give rise to undesirable uncertainty, litigation and inconsistency between similar tribunals. It may even lead a court to refuse to recognize a particular statutory power on the basis that it was expressly conferred on other administrative tribunals.

In *Vancouver (City) v. British Columbia (Assessment Appeal Board)*[32], the issue was whether the Assessment Appeal Board could hear evidence *in camera*. In answering the question "no", the Court made specific reference to a number of other statutes in which the legislature had seen fit to grant such power explicitly. As noted by the Court at para. 64:

> *In many statutes where the legislature has seen fit to permit certain boards to hold proceedings in camera, it has expressly conferred the power in the enabling Act: see, for example, the Commodity Contract Act, R.S.B.C. 1979, c. 56, s. 4(8); the Employee Investment Act, S.B.C. 1989, c. 24, s. 34.1(4); and the Securities Act, S.B.C. 1985, c. 83, s. 127(5). It has not done so in the case of the Assessment Act. Given the absence of express provision for in camera hearings in the Assessment Act, and the public nature of the assessment process, I find it impossible to say that by necessary implication the Board must have the jurisdiction to conduct a portion of its hearings in camera.*

The above decision demonstrates that in defining the power of a particular administrative tribunal, courts are prepared to give significant weight to how the legislator has defined the powers of other administrative tribunals. This judicial approach is based on a presumption of legislative consistency and coherency. Yet it makes plain that any significant failure to think about statutory powers in a careful and principled way across the system of administrative justice risks unnecessary cost, confusion and litigation for the administrative justice system.

In seeking to think about statutory powers in a principled way, it is very important not to confuse discussions about encouraging greater uniformity in the design and expression of tribunal powers with the view that all tribunals ought to have all the same powers, or ought to exercise them in the same way. As is reflected in the work of the numerous law reform bodies that have considered this issue, the focus here is on creating a principled set of *enabling* provisions that can be fitted to

each administrative tribunal on a case by case basis, intended to confer upon the tribunal the flexibility to exercise its powers in ways that work best for the tribunal.[33] The discussion here is not about imposing "one size fits all" for tribunals serving diverse functions. It is about developing and determining the relevant menu of powers that similarly situated tribunals should have so that they can in turn carry out their mandates with the required good judgment and proper regard to the regulatory and practical context in which they operate.

As noted above, it would be wrong to leave the impression that every provincial administrative tribunal in British Columbia labours under legislation that is deficient in respect of statutory powers. In the discussions leading up to the preparation of this paper, representatives of two provincial administrative tribunals have in fact stated that they do not see any serious difficulties or omissions in their enabling legislation in this respect.[34] In this context, one of the purposes of this paper is to seek comment regarding whether or to what extent these views represent the reality for other administrative tribunals. However, based on the consultation to date with other provincial administrative tribunals, a comparison of their enabling legislation with that of the two boards in question, and a review of the experience in other jurisdictions, it is likely incorrect to conclude that the views of those two boards represents the experience for all, or even most, provincial administrative tribunals. Reform of tribunal legislation to take better account of the realities in which the tribunal operates does not appear to have been a consistently high priority on legislative agendas across government. A number of the alternatives for reform of statutory powers have been developed in recognition of this very reality.

Legislative choices regarding statutory procedures

A second group of questions, which have been more controversial, revolve around what if any statutory procedural obligations ought to be imposed on a particular administrative tribunal before it makes a decision.

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32 [1996] B.C.J. No. 1062 (C.A.).

33 As noted above (pp. 9-10), it would seem, for example, to make little sense for one statute to explicitly authorize members to complete ongoing work beyond the expiry of their terms while exposing others to the common law outcome on this point. Similarly, there does not appear to be any compelling reason why some tribunals that hear witnesses have the power to compel evidence while others do not.

34 The two tribunals in question are the British Columbia Securities Commission and the Property Assessment Appeal Board. The legislative history of the *Securities Act* discloses that that statute has received ongoing legislative attention over the years. For its part, the Property Assessment Appeal Board's powers underwent significant

At common law, two fundamental rationales underlie procedural rights. First, there is the functional value of "hearing both sides" in helping decision-makers to make better decisions. Second, there is the moral justification for granting procedural rights to persons adversely affected by state action, as reflected in the following statement of the Supreme Court of Canada:

> *I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.*[35]

Today in Canada, most tribunal decisions having the potential for any significant impact on the individual give rise to a basic duty of fairness at common law. The real battle in most disputes today concerns the content of that duty, which the Supreme Court of Canada has held to be "eminently variable".[36] In determining the minimum content of procedural fairness, courts take into account factors such as the purpose of the statute, the closeness of the decision to a traditional judicial decision, the impact on the individual, legitimate expectations, the choices made by the agency itself and its institutional constraints.[37] The outcome of this analysis necessarily reduces to a value judgment about the importance, in any particular context, of process requirements when balanced against competing considerations such as tribunal efficiency and effectiveness.

The common law method has the advantage of providing finely calibrated answers to specific fairness issues in individual disputes.

It has been argued, however, that there are four disadvantages to relying solely on the common law to resolve key procedural rights. First, there is the cost and uncertainty of having to go to court to get an answer that could have been addressed in the statute. The McRuer Report put the matter this way in 1968:

> *...the development of procedural requirements of limitations applicable to tribunals with a wide variety of powers and a wide variation in their constitution,*

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legislative revision in 1998 and addresses many of the points raised in this paper: S.B.C. 1998, c. 22.

35 *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at para. 25.

36 *Knight v. Indian Head School District (No. 23)*, [1990] 1 S.C.R. 653 at p. 682.

37 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

> *cannot be satisfactorily left to the courts. In any case it is quite unrealistic to expect laymen to be presumed to know when and under what circumstances and to what extent the rules of natural justice apply to the statutory powers they exercise. It is also quite unrealistic to expect the courts to evolve suitable rules for individual tribunals. It is therefore essential that means be found to develop rules appropriate to the varying purposes and characteristics to which they are respectively applicable.*[38]

Second, some jurisdictions have regarded it as very important for both administrative tribunal members and the public to legislate an explicit, visible set of minimum procedural rights that must be accorded to persons affected by a tribunal's decisions. On this approach, the common law is a pale substitute for legislative recognition of basic procedural protections. Thus, as early 1946, a number of American jurisdictions adopted an approach reflected today in Alberta, Ontario and Quebec, and to a lesser extent in numerous individual tribunal statutes across Canada:

> *Every student of administrative law recognizes that many of the procedural details involved in administrative action must necessarily vary more or less from state to state and even from agency to agency within the same state. Each state and each agency must work out these details for itself according to the necessities of the situation. However, there are certain basic principles of common sense, justice and fairness that can and should prevail universally. The proposed act incorporates these principles, with only enough elaboration of detail to support the essential major features.*[39]

Third, some commentators have also questioned the outcomes when the balance between process and efficiency is left solely to courts. David Mullan has observed that "[t]raditional judicial values have been in the habit of intruding too frequently."[40] A former chair of an Ontario administrative tribunal has expressed the concern more colourfully:

> *Lawyers are confronted in tribunals with a quasi-court whose policy origins they are not trained to understand. They are on a never-ending crusade to twist the tribunal into something they know and understand better – the court. They seek more structure, more process, and greater formality. And in this, they are ably assisted by the judiciary…*
>
> *This has left the tribunal's public, the consumers, somewhat bewildered. They understood tribunals to be an alternate form of dispute resolution to the courts, less formal, less cumbersome, more expeditious. Instead, they find themselves carried along on a wave of procedural wrangling which, as their lawyers explain, must necessarily take weeks rather than the days they had expected. Instead of*

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38 Royal Commission of Inquiry on Civil Rights (1968), p. 147.

39 An excellent review of history and development of "administrative procedures" legislation in the United States up to 1968 is found in the Report of the Ontario Royal Commission Inquiry into Civil Rights (1968) ["the *McRuer Report*"] at pp. 148-181.

40 Mullan, "Common and Divergent Elements of Practices of the Various Tribunals: An Overview of Present and Possible Future Developments" (1992), Law Society of Upper Canada Special Lectures 461 at p. 476.

> *learning quickly what the outcome was after these weeks of complex evidence and argument, they find themselves waiting months to get a voluminous decision any law review would be proud to print. Yet the public is only interested in the last page where they can see if they won.*[41]

Fourth, to the extent that legislated procedures – particularly minimum procedures – are seen as ensuring more uniform, fair and consistent treatment across the spectrum of administrative tribunals, they are seen by some as being a positive development. Those who support minimum procedures legislation do not regard such legislation as imposing a procedural straightjacket; they do, however, see it as enshrining basic standards of decent treatment for all persons affected by tribunal decisions, subject to the exceptions written into the law. They also see such legislation, importantly, as forcing tribunals to think more carefully and critically about their processes, and about making those processes transparent to the public, rather than simply relying on past practice and the assertion that "this is how we do things around here".

Those who oppose legislating procedures have, on the other hand, expressed fear that legislating procedures – particularly minimum procedures – will lead to one of two possible outcomes. They will either be seen as adding nothing to the common law, or they will be seen as adding something to the common law. If they are seen as adding nothing to the common law beyond a symbolic statement of values, opponents question their practical utility. If, on the other hand, they are seen as adding something to the common law, the question arises as to precisely what they are adding, and whether they should be adding it.

While legislation is clearly capable of restricting common law procedural fairness obligations[42], opponents of minimum procedures legislation observe that such legislation is not usually intended to have that effect. In this context, some argue that any limitation on tribunal flexibility is a retrograde step, that legislating minimum procedures will serve only to further formalize and judicialize administrative tribunal practice, and that all this will in fact do little to limit further uncertainty and litigation concerning the content of procedural entitlements. Others argue that in a system of administrative justice, some degree of uniformity in the practice of administrative tribunals based on a set of basic procedural values is a reform to be welcomed. Yet others argue that a process for ensuring legislative attention to these questions is appropriate, but that the objective of

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41 Abella, "Canadian Administrative Tribunals: Towards Judicialization or Dejudicialization?" (1989), 2 C.J.A.L.P. 1 at pp. 6, 7.

42 *Ocean Port Hotel*, *supra*, note 13 at para. 22.

achieving standard practice and uniformity across administrative tribunals is less important than ensuring legislative attention to appropriate balance between process and efficiency for each individual tribunal.

The mechanics of reform

A third group of questions relates to the mechanics of reform, if reform is regarded as appropriate. As the discussion below will make clear, there are a number of possible approaches to law reform in this area:

- Statutory powers and procedure legislation establishing a uniform, detailed and exhaustive "code" applying to administrative tribunals within the ambit of the statute.
- Statutory powers and procedure legislation establishing a *minimum* code applying to administrative tribunals within the ambit of the statute.
- Statutory powers and procedure legislation that is detailed legislation, but that vests in tribunals themselves the ability to "opt in" to those provisions that apply to them.
- Revision of tribunal powers and procedures on a statute-by-statute basis, with legislative drafters making the choice of particular powers and procedure for each tribunal from a non-statutory checklist of "Model Rules".
- Rule-making by the tribunal itself.

As will be seen shortly, the subject of statutory powers and procedures has been the subject of study and/or legislation, both in England and in a number of Canadian jurisdictions. Before turning to those reviews, however, it will be appropriate to refer to a fourth and final reality that underlies this paper.

Powers and procedures reform is closely tied to government policy regarding appointments and training

The fourth key reality that underlies this paper is that, as significant as the subject matter of statutory powers and procedures may be to ensure the effective operation of administrative tribunals, even the most enlightened legislative reform initiative will be at risk if it is not accompanied by high quality appointments and training.

This paper is not the vehicle for a detailed discussion of the process for tribunal appointments and training in British Columbia. That subject has, quite rightly, been deemed sufficiently important to warrant its own paper as part of the Administrative Justice Project. Brief mention of

the subject in this discussion paper is however necessary given its inextricable link with the effective exercise of statutory powers and procedures. The following quotations suffice to make the point:

> *The notion of commitment to the delivery of administrative justice also raises the controversial issue of one of the most obvious gaps in the three Acts: the absence of any provisions about independence and the appointment and performance of members of tribunals:* Mullan, Administrative Law (2001), Part 3, ch.11E, p. 1 (Q.L.)

> *Excellence … breeds respect, credibility, legitimacy and curial deference. No amount of structural "reform" to the powers and process of an administrative tribunal can come close to conferring the benefits provided by a tribunal consisting of first rate decision-makers. As is the case with most other institutions in society, the calibre of the people doing the job is the single most important factor to its success: Falzon, "Case Comment: Ocean Port Hotel v. British Columbia (Liquor Appeal Board)",* Administrative Law – 1999 Update, Continuing Legal Education, p. 16.

> *There may perhaps be a tendency among lawmakers to believe that once a law is in place, the problem is solved. The lawmakers then move on to the next challenge. Those of us left to work with the new statute know that it is a daily challenge to breathe life into the law, to meet the lawmakers' aspirations in the day-to-day decision making of tribunal members. And it is there, in the mind and heart of the individual tribunal member, not on the floor of the legislature, that administrative justice reform will be won or lost:* Steele, "God from a Machine: New Proposals for Administrative Justice Reform" (1998), 10 C.J.A.L.P. 241 at p. 247.

> *The age of learning on the job, and seat-of-the-pants conduct of hearings, is gone:* Leggatt: *"Tribunals for Users: One System, One Service", Report of the Review of Tribunals,* March, 2001, p. 7.40.[43]

Statutory powers and procedures are a means to an end; they do not decide cases. They represent a "legislative tool kit" intended to assist administrative decision-makers to carry out their statutory mandates in an effective, fair, creative and efficient manner. In good hands, effective tools can produce outstanding work. In untrained hands, such tools may be positively dangerous.

3 LAW REFORM IN CANADA AND ENGLAND

No meaningful discussion of potential law reform in relation to statutory powers and procedures can take place without some understanding of the very extensive thinking that has informed this

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[43] There are numerous other statements to this effect, going back at least to the Franks Report (1957), para. 44.

subject in the various jurisdictions of Canada and elsewhere. While the constraints of this paper do not allow for a detailed review of each legislative proposal, a meaningful overview of major proposals and related legislation is necessary to assist readers in identifying the major issues, debates and alternatives. As will become apparent, there has been an immense amount of writing and thinking about this subject that can be drawn upon by British Columbia legislators.

In order to keep this paper to a manageable length, the comparative review has been limited to England and Canada (provincial and federal). The review is organized according to jurisdiction. Order has been determined based on the chronology of the first major report or enactment addressing the subject of statutory powers and procedures following the Second World War. Once discussion of a particular jurisdiction has commenced, subsequent developments in that jurisdiction are traced to the present day. This approach has been taken to assist in a coherent review of the law in each jurisdiction, and to provide a useful basis for comparing proposals and criticisms that have been made from time to time in other jurisdictions.

England

Report of the Committee on Administrative Tribunals and Enquiries (1957) – The Franks Report

In 1955, Sir Oliver Franks was appointed by the Lord High Chancellor to consider and make recommendations on the constitution and working of tribunals in Great Britain. The Franks Report was the first such review in England following the Second World War[44], which period had seen a significant increase in the numbers and the importance of tribunals "other than ordinary courts of law".[45] As noted at paragraph 5 of the report:

> *Since the war the British electorate has chosen Governments which accepted general responsibilities for the provision of extended social services and for the broad management of the economy. It has consequently become desirable to consider afresh the procedures by which the rights of individual citizens can be harmonized with wider public interests.*[46]

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44 The 1932 report of *The Committee on Ministers' Powers*, more commonly referred to as the "Donoughmore Report" is referred to in the Franks Report. That report, which followed the publication of Lord Hewart's famous book *The New Despotism*, is discussed in the *Franks Report*.

45 Franks Report, p. iii and para. 5.

46 The Franks Committee appears to have been no exception to the proposition that Commissions of Inquiry are not struck in political vacuums, or for mere academic interest. The "Critchel Down imbroglio" occurred in 1956, and involved a poorly handled expropriation which affected a high profile person's would be succession rights to the expropriated land. The fallout from the affair included the resignation of a minister and

The Franks Committee reported that most of the evidence it received focused on tribunal procedure. Noting that there was general agreement "on the broad essentials" which include "notice of the right to apply to a tribunal, notice of the case which the applicant has to meet, a reasoned decision by the tribunal and notice of any further right of appeal", the Franks Committee arrived at three key conclusions with regard to statutory procedure:

1. Procedure is "of the greatest importance" and should be clearly laid down in a statute or statutory instrument.

2. It would not be appropriate do so by way of either a single code or a small series of codes:

   > *We agree that procedure is of the greatest importance and that it should be clearly laid down in a statute or statutory instrument. Because of the great variety of the purposes for which tribunals are established, however, we do not think it would be appropriate to rely upon a single code or a small number of codes. We think that there is a case for greater procedural differentiation and prefer that the detailed procedure for each type of tribunal should be designed to meet its particular circumstances.*[47]

3. The appropriate body to create the rules applicable to each tribunal would be a body called the "Council on Tribunals", whose fundamental purpose would be to advise government and keep the constitution and workings of tribunals "under continuous review".[48]

The Franks Committee endorsed the view that informality is a very important feature of most administrative tribunals. At the same time, it expressed this caution: "...the attempt which has been made to secure informality in the general run of tribunals has in some instances been at the expense of an orderly procedure. Informality without rules of procedure may be positively inimical to right adjudication, since the proceedings may assume an unordered character which makes it difficult, if not impossible, for the tribunal properly to sift the facts and weigh the evidence."[49]

Because of its view that recommending specific rules was the proper function of a "Council on Tribunals", the Franks Committee did not do so. It did, however, outline a number of key points to be followed in the "rules" work of such a council. For purposes of this paper, these points are worthy of summary as a basis for comparison with later reform proposals, and indeed, with present tribunal statutes in British Columbia:

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the appointment of the Franks Committee: see generally, Sprague, "Thirty Years after the Franks Committee Report – Alberta's Report Card" (1989), 5 Admin. L.J. 66 at p. 67.

47 Report of the Committee on Administrative Tribunals and Enquiries (1957) at para. 63.

48 *Ibid*, paras. 62, 63, 127-134.

49 *Ibid*, para. 64.

- Citizens must be advised of their right to apply to a tribunal.
- Citizens must know in good time the case they will have to meet, which requires no more or less than a document setting out the main points of the opposing case.
- Tribunal hearings should have a set order of events that the tribunal itself can vary where variance is in the interests of justice.
- Tribunal hearings should generally be held in public, except where compelling reasons dictate otherwise.
- Witnesses should generally enjoy the same immunity from suit in tribunal proceedings as they do in the courts.
- Government departments should not be entitled to legal counsel unless the citizen employs a lawyer, but the citizen should only be deprived of counsel "in the most exceptional circumstances".
- While in practice tribunals should not find it necessary to administer oaths and issue subpoenas, they should have this power to exercise where required.
- In disputes between the citizen and government, the citizen should never have to pay costs, but government should generally be required to pay reasonable expenses of successful applicants; in "party-party" disputes, costs should be awarded only with respect to frivolous applications.
- After the hearing, reasons should be given and leading decisions published.[50]

The Tribunals and Inquiries Act, 1958[51]

The recommendations of the Franks Report were, in general, accepted, including its major recommendation that a "Council on Tribunals" be created. The Council – which consists of a mix of membership but which has "leaned heavily" on its legal members[52] – has remained a feature of English administrative law ever since.[53] Franks had advised that one of the Council's main functions should be "to suggest how the general principles of construction, organization and procedure enunciated in this report should be applied in detail to the various tribunals."[54]

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50 *Ibid*, paras. 67-102.

51 Tribunals and Inquiries Act (1958), 6 & 7 Eliz. II, c. 66.

52 de Smith, *Judicial Review of Administrative Action* (1995), p. 59.

53 See now *Tribunals and Inquiries Act, 1992*.

54 Report of the Committee on Administrative Tribunals and Enquiries (1957) at para. 133.

The *Tribunals and Inquiries Act*, passed one year after the Franks Report, created the Council on Tribunals. Section 8(1) of the Act provided that "No power of a Minister ... to make, approve, confirm or concur in procedural rules for any such tribunal as is specified in the First Schedule of this *Act* shall be exercisable except after consultation with this Council".

To effectively carry out the Council's functions, Council members became acquainted with the various tribunals by sitting in on their hearings. It appears that by 1964, most of the active tribunals under its supervision had statutory rules of procedure.[55] Government departments normally consult the Council with respect to proposed tribunal legislation. The Council makes general recommendations regarding appointments and writes annual and special reports on administrative law questions.

The Council has published Model Rules of Procedure for tribunals for departmental guidance. Writing in 1989, Grant Sprague stated that *"If one considers that the Council is essentially a weaponless body, one must conclude that they are doing very well for having lasted 30 years and having been as successful as they have been in reforming the procedures of tribunals and influencing both government and Parliament".*[56] Writing in 1995, the authors of de Smith have stated that the Council "has helped to give concrete expression to the Franks principles of fairness, openness and impartiality".[57]

Why did the English act upon Franks' recommendations and create the Council on Tribunals? Part of the answer undoubtedly lay in the Council's lack of expense (only the chair is paid, other members perform the work *gratis*). Grant Sprague, however, has suggested that other factors were also at play:

> *...perhaps there was also a more altruistic element: providing the best form of government for the people. Undoubtedly, there is a strong tradition in the Anglo-Saxon mind for fairness and straight-shooting.*[58]

Model Rules of Procedure: Council on Tribunals (1991)[59]

The Council published its most recent Model Rules in February, 2000. The Model Rules, as their name implies, are neither a comprehensive code, nor an enactment. They are a compilation of

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55 see generally the discussion of the Council in the *McRuer Report*, at pp. 202-205.

56 Sprague, *supra*, p. 70.

57 de Smith, Judicial Review of Administrative Action (1995), p. 58.

58 Sprague, *supra*, p. 70.

59 The Council on Tribunals' Model Rules were most recently updated on February 16, 2000.

model procedural rules "for the use of Departments and tribunals which are engaged in drafting or amending rules for tribunals." As noted in the Introduction to the Model Rules:

> *It must be emphasized that this compilation is not a code. It is a store from which Departments and tribunals may select and adopt what they need. In making their selection from the various provisions, Departments and tribunals should give careful consideration as to what is necessary or useful for the purpose of the particular tribunal. They should not just adopt a rule because it happens to be included in this compilation, and they should not feel inhibited about modifying or adapting a model rule if the model does not fit the particular needs or circumstances of the tribunal.*[60]

The Model Rules are predicated on the notion that it is highly desirable when drafting legislation to give early and detailed consideration to the powers and procedures of the tribunal. A general power in the enabling statute to make rules for "the practice and procedure" of the tribunal is unlikely to suffice for the needs of a modern tribunal. The commentary to the rules states that while the model rules are extensive, their essential aims are simple:

- So far as concerns the appellant/applicant (and as regards third and fifth points below, the respondent), the aim should be to provide:
  - For his awareness of what his rights are and how the proceedings will develop;
  - A simple means of invoking the tribunal;
  - A full opportunity to put his own case and to know his opponent's case;
  - The removal of ignorance and fears of the procedures of the tribunal;
  - A right to receive reasons for decisions.
- So far as concerns the tribunal, the aim should be:
  - To provide sufficient power to establish the facts;
  - To be able to adapt the procedure to the needs of a particular case;
  - To be able to bring on and decide the case with expedition and efficiency;
  - To be able to correct mistakes.

The Council's *Illustrative Basic Rules* are available at:

www.council-on-tribunals.gov.uk/specialreports/modelrules.htm.

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60 *Ibid*, Introduction, item 2.

Report of the Review of Tribunals by Sir Andrew Leggatt (2001) (The Leggatt Report)[61]

The Leggatt Report represents the first comprehensive review of English administrative tribunals since the Franks Report. While the discussion that follows concentrates on Leggatt's comments regarding tribunal powers and procedures, it is important to note that the Leggatt Report is about very much more than powers and procedures.

The Leggatt Report is influenced by Australian administrative law reform[62], and is predicated on the view that administrative tribunals should be more independent from government departments. Leggatt calls for what he describes as "radical changes"[63] to the English tribunal system, particularly that part of the system engaged in hearing appeals from ministry decisions where, at present, many appellants feel like "every appeal is an away game".[64] The key elements of Leggatt's proposed changes are the creation of a nationwide, "one stop" tribunal registry run out of a single ministry (the Lord Chancellor's office), a radical reorganization of tribunals involved in disputes between citizen and state, and the exclusion of judicial review in favour of specialized administrative appeal courts.[65]

Leggatt also makes a number of suggestions regarding tribunal powers and procedures that are germane to the present discussion. These discussions are significant because they extend beyond the words on the pages of statute books, and into the trenches of tribunal practice:

- Tribunals exist to serve the user: Tribunal procedures must be structured in such fashion as to enable users, where possible, to present cases themselves.[66] For the tribunal this implies a need to give users, in advance, procedural advice, information about jurisdictional issues and remedies, information about pre-hearing, hearing and decision

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61 Tribunals for Users: One System, One Service", *Report of the Review of Tribunals by Sir Andrew Leggatt,* March, 2001.

62 Discussion of administrative law reform initiatives or legislation in Canada is conspicuously absent.

63 *Ibid*, para. 3.3.

64 Ibid, Overview, para. 3.

65 *Ibid*, see generally chapters 3, 5, 6.

66 As noted in the Report, para. 4.3: "The effective communication of information about how to start a case, prepare it for submission to the tribunal and present it at a hearing is not an optional extra of good service to users. It is fundamental to the reason why tribunals exist separately from the ordinary courts. With very few exceptions the aim should be that tribunals' distinctive procedures and approach should enable users to prepare and present their cases themselves.... [U]sers were increasingly turning to lawyers or others for help. Overall, that is a serious failure in the system, which should be corrected urgently".

timetables, and information about the availability of consensual dispute resolution options.

- The Council on Tribunals should assume a more prominent role: Departments should be required by law to consult with the Council during the preparation of draft legislation, and the Council's comments should be appended to any bills put before Parliament. Further, the Council should monitor the development of new tribunals, ensure that tribunals are user-friendly, monitor the training of tribunal members, and publish any findings that arise from visits to tribunals.[67]

- Active case management: To ensure efficient and effective hearings, tribunals must be empowered to establish rules, and impose sanctions for failure to follow them – such sanctions to include the power to refuse adjournments, to disallow late documents, to award costs where delays prejudice other parties and to summarily dismiss appeals. Such rules should be contained in tribunal rules or practice directions. Tribunals must also make more use of electronic hearings and pre-hearing procedures, and utilize registry staff in pre-hearing case management.[68]

- Flexible hearing procedure: As part of active case management, tribunals should assess the merits of written or oral procedures for the particular case, including whether to ask each party for their preference.[69]

- Alternate dispute resolution: ADR has been widely welcomed in civil justice reform, and "it is likely that increased use of ADR may be possible in at least some areas of tribunal work". Tribunals themselves represent in an important sense an alternative to the courts,

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67 *Ibid*, paras. 7.46-7.55. See in particular, para. 7.47: "The Council possesses a great deal of knowledge about the operation of tribunals today. It has made some efforts to promote policies and standards. Its Model Rules of Procedure are a major achievement. Its work on independence of tribunals and on standards of accommodation and of training deserve notice. Its has also drawn attention to the importance of competence in tribunal chairmen and members. But it has not published its visit reports, nor exposed the defects they identified. It has failed to gain visibility for its criticisms, for example in its Annual Reports, whether or not the failure has been due to departmental opposition. Visitors who have given evidence to the Council have not found the experience as challenging as they should have. In focusing on the need for detailed comment on specific issues, it has given insufficient emphasis on strategic thinking about administrative justice generally or about tribunals in particular."

68 *Ibid*, paras. 8.2 – 8.12.

69 *Ibid*, para. 8.15.

but ADR processes focused on assisted settlement, particularly in the case of party-party tribunals, are important tools.[70]

- Communication with departments, and tribunal consistency: Rather than continue with tribunal decisions that have impact on only a "one off" basis, mechanisms should exist for direct communication between tribunals and departments to ensure that the latter learn the lessons of adverse decisions:

> *[T]ribunals are well placed to pick up systemic problems in decision-making within the department, from decision letters which are confusing, through administrative systems which muddle or miss key facts, to a flawed decision-making process which leads to misconception of the law.*[71]

To this end, tribunals themselves should take steps to make consistent decisions.

Leggatt does not provide specific legislative proposals to achieve the six ends listed. His operating assumption is that tribunals operating in accordance with the flexible powers contained in the Council's Model Rules would be capable of carrying them out.[72] The six items summarized above from Leggatt emphasize the important of marrying tribunal powers and procedures with creative and effective tribunal practice.

Alberta

The Clement Report (1965)

In 1965 – eight years after the Franks Report – the Province of Alberta established a committee, headed by Carleton Clement, to examine the powers of statutory tribunals. The government's perspective in establishing the committee is evident in the committee's terms of reference, which directed a study of "the degree to which these Boards infringe upon the rights and liberties of the subject".[73]

From these terms of reference, it is fair to surmise that the "Clement Committee" was tasked, at least in significant measure, with discovering a way in which to provide a "bridle for Leviathan".[74] This having been the premise, it is not surprising that Clement opted against the Franks approach

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70 Ibid, paras. 8.17 – 8.23.

71 Ibid, para. 9.11.

72 *Ibid*, Part III, recommendation 199.

73 Sprague, "Thirty Years after the Franks Committee Report – Alberta's Report Card" (1989), 5 Admin. L.J. 66 at p. 76.

74 Harvey, "The Rule of Law in Historical Perspective" (1961), 59 Mich.L.Rev. 487 at 491.

of recommending individualized procedures monitored by a Council on Tribunals. Instead, Clement opted for a solution Franks had rejected: the establishment of a minimum set of rules which would apply to all tribunals within its ambit.[75]

This had been the approach taken in the United States as early as 1946, when the federal *Administrative Procedure Act* was passed. Similar legislative initiatives followed in a number of American states, many of which adopted a "Model Statute" developed for state purposes, which statute was prefaced with this explanation, quoted above and repeated here for convenient reference:

> *Every student of administrative law recognizes that many of the procedural details involved in administrative action must necessarily vary more or less from state to state and even from agency to agency within the same state. Each state and each agency must work out these details for itself according to the necessities of the situation. However, there are certain basic principles of common sense, justice and fairness that can and should prevail universally. The proposed act incorporates these principles, with only enough elaboration of detail to support the essential major features.*[76]

Administrative Procedures Act (1966)[77]

The Clement Committee's 1965 report led to the enactment in 1966 of the Alberta *Administrative Procedures Act*.[78] The key features of Alberta's *Administrative Procedures Act*, which remains in effect today, are these:

- The Act's provisions apply only to the tribunals, and to the extent, designated by the Lieutenant-Governor-in-Council. Presently, there are approximately ten such designations.[79] The Act also states that it "does not relieve the authority from complying with any procedure to be followed by it under any other Act."
- The Act is very brief. The required minimum procedures are listed at a high level of generality:

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75 See generally Sprague, *supra*, note 40 at pp. 76-77.

76 An excellent review of history and development of "administrative procedures" legislation in the United States up to 1968 is found in the Report of the Ontario Royal Commission Inquiry into Civil Rights (1968) ["the *McRuer Report*"] at pp. 148-181.

77 R.S.A. 1980, c. A-2.

78 Administrative Procedures Act, S.A. 1966, c. 1.

79 Mullan, *Administrative Law* (2001), Part Three, ch. 11C, p. 1 (Q.L.).

- Notice: Before a statutory power is exercised, the authority shall give all parties "adequate notice" of the application, and its information "in sufficient detail" to permit them to understand the facts.
- Participation: "reasonable opportunity" to furnish evidence and "adequate opportunity" to make argument.
- Right to contradict facts, and cross examine where necessary for fairness.
- Right to make representations does not require oral representations or legal counsel.
- Oath not required, nor is tribunal required to adhere to rules of evidence in court.
- Reasons for decision required.

Consistent with its purpose (and its title), the Alberta *Administrative Procedures Act* is concerned only with the *duties* owed by statutory bodies to the citizen. Unlike the later Leggatt Report – or even the earlier Franks Report – it does not address the issue of the statutory *powers* tribunals require in order effectively discharge their functions.

Alberta Law Reform Institute Report (1999)

In December 1999, the Alberta Law Reform Institute published a report entitled "Powers and Procedures for Administrative Tribunals in Alberta". It begins with this assessment of the existing law in Alberta:

> *The existing legislation that governs the procedures of adjudicative tribunals in Alberta – the Alberta Administrative Procedures Act – is seriously deficient. This act has not kept up to date with developments in the law respecting fairness and fundamental justice, nor with new methods and processes that can help make tribunals more efficient in terms of the use of their resources, and better-equipped to run their hearings efficiently… Our purpose is to provide procedural rules that take into account case law developments relative to the requirements of natural justice, and new procedures to enhance efficiency and effectiveness, and to make them more widely available.*[80]

It was open to the Institute to recommend repeal of the 1966 Act, thus leaving powers and procedures issues to individual statutes and the common law. The Institute's intent, however was "to ensure that the procedural rules of tribunals are consistent and visible for the benefit of users. We have located the procedures in a single comprehensive Code. To the extent that they are

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[80] Alberta Law Reform Institute, *Powers and Procedures for Administrative Tribunals in Alberta* (December, 1999), Report No. 79.

adopted, they will make procedures highly visible and readily accessible to those who appear before tribunals."[81]

The Institute recognized that a single comprehensive code could not apply to all tribunals. It adopted a unique implementation method:

> *Our solution to the implementation question was to recommend legislation ... in the form of an "opt in" statute – the* Administrative Powers and Procedures Act. *Under this proposal, every tribunal will compare its existing procedures to our Code, and will choose those powers and procedures from the Code that that it needs to help make its decisions fairly and enable it to be as effective and efficient as possible.... Under our proposal a tribunal that needs a particular power for the conduct of its business may apply to adopt the related Code provision, and if this application is approved, by ministerial order, the tribunal may thereafter exercise the power. The advantage of using this mechanism is both avoidance of the need for legislative amendment, and consistent and visible rules.*[82]

While the content of the Institute's Model Code is very similar to the Model Rules in England, the English "Rules" are merely a non-statutory compilation to assist host departments in drafting legislation for tribunals. The Institute's proposal is for the passage of legislation – called the *Administrative Powers and Procedures Act* – which would enable tribunals themselves to "opt in" to Model Code provisions in whole or in part, as suits the needs of the tribunal. Tribunals would be required to undertake such a review to determine whether and to what extent "opt in" is appropriate. Tribunal "opt in" requests would become legally effective upon approval by the Minister of Justice. As explained by the Institute:

> *The approval process that we recommend is especially significant with respect to the additional powers in the proposed legislation that cannot be implied as essential to the performance of the tribunal's mandate. Some of these powers can enable tribunals to effect participants' rights significantly. Examples are the power to reconsider a decision, or to extend a statutory time period. We think it is important that before a tribunal can appropriate such powers, there be a check on whether the powers are suitable and necessary.... It is primarily for powers like these that we recommend the ministerial approval process. However, for the sake of simplicity and uniformity, we recommend a common process....*[83]

The majority of the Institute's 190-page report represents a very useful, annotated discussion of the content of the proposed Model Code. For present purposes, it will suffice to observe that the Institute has engaged in what appears to be an even more exhaustive collection of the key

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81 Ibid, p. 9.

82 Powers and Procedures for Administrative Tribunals in Alberta (December, 1999), p. 11.

83 *Ibid*, p. 30.

subjects of tribunal powers and procedures than does the English Model Code. The proposed menu of powers and procedures addresses:

- Pre-Hearing Powers and Procedures: acknowledgements and notifications, dismissal without hearing, consent orders, and pre-hearing conferences, including proactive use of staff and members;[84]
- Alternate Dispute Resolution: authority to engage in ADR practices, to issue tribunal orders giving effect to consensual agreements, to engage in ADR at any point in the proceedings, to protect confidentiality of statements made and materials used in ADR proceedings;[85]
- Hearing Powers and Procedures: authority to adopt general rules of procedure, to grant standing, issue notice of hearing, set hearing panels, close hearings in exceptional cases, proceed in writing or in person, to grant adjournments, not to be fettered by rules of evidence except where this would cause significant unfairness, and to compel witness and documents. This section also makes clear that the panel chair is responsible for the conduct of the hearing, codifies the rule about wider consultation in *Consolidated-Bathurst*, and authorizes members to complete ongoing work after expiry of a term;[86]
- Decision and Reasons: addresses interim decisions, time limits for decisions, written reasons, publication of reasons, majority decision, reconsideration and correction of errors;[87]
- Miscellaneous Powers: subjects include contempt, costs, extending time, *ex parte* decisions, tribunal publication of rules of procedure, process for addressing bias allegations.

It is not apparent whether administrative law reform is on the agenda of the Alberta government at the moment. Whatever its fate in that jurisdiction, the Institute's report is an impressive achievement, and represents an important contribution to any discussion of statutory powers and procedures in British Columbia.

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84 *Ibid*, pp. 39-57.

85 *Ibid*, pp. 57-62.

86 *Ibid*, pp. 82-130.

87 *Ibid*, pp. 131-158.

Ontario

Royal Commission Inquiry Into Civil Rights (McRuer Report) (1968)[88]

The Ontario Government established the Royal Commission of Inquiry into Civil Rights in 1964. The "McRuer Report", as it became known, was issued in February 1968 - two years after passage of the Alberta *Administrative Procedures Act*. The inspiration for Carleton Clement's 1965 terms of reference in Alberta may be found in the Ontario government's terms of reference to Chief Justice McRuer only a year earlier:

> 1. *To examine, study and inquire into the laws of Ontario including the statutes and regulations passed thereunder affecting the personal freedoms, rights and liberties of Canadian citizens and others resident in Ontario….*
>
> 2. *[T]o recommend such changes in the law, procedures and processes as in the opinion of the commission are necessary and desirable to safeguard the fundamental and basic rights, liberties and freedoms of the individual from infringements by the State or any other body.*

The McRuer Report is an ambitious, multi-volume administrative law *tour de force*. Whatever one's position on the policy questions discussed in the report, the depth and breadth of McRuer's research represented a major achievement. Like the Leggatt Report, the McRuer Report is about more than administrative powers and procedures. The report canvasses matters ranging from constitutional theory, to the structure and organization of tribunals, to the principles governing appeals and judicial review, to subordinate legislation. McRuer even reviewed and made recommendations regarding the civil court system in Ontario.

Chapter 14 of the report[89] addresses "procedural safeguards" for the exercise of statutory powers in Ontario. The philosophy that underscores this part of the report is reflected in an American quotation adopted by the commission:

> *The essence of justice is largely procedural. Time and again thoughtful judges have emphasized this truth. Mr. Justice Douglas: "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under the law." Mr. Justice Jackson: "Procedural fairness and regularity are of the indispensable essence of liberty".*

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88 Royal Commission Inquiry into Civil Rights, February 7, 1968, Hon. J.C. McRuer, Chair.

89 *Ibid*, pp. 206-223.

> *Mr. Justice Frankfurter: "The history of liberty has largely been the history of procedural safeguards".*[90]

The McRuer Report saw this, however, as only the beginning of the analysis. Recognizing that one could not focus exclusively on procedure, McRuer noted that "the main problem in establishing a just procedure for the exercise of a statutory power is the reconciliation of procedural justice with effective governance." The need for such reconciliation having been recognized, however, McRuer observed that "[t]he conflict between the two demands is often less real than it is made to appear".[91] To achieve a proper balance, McRuer identified the following five options:

> *1. To leave the development of the law relating to procedure to the courts*
>
> *This option was rejected, on the basis that while "judicial decisions may tend to decrease uncertainties and reconcile procedural justice and effective government to a certain extent, that development will not be systematic and it will inevitably be a slow process attended by much uncertainty during the process…"*[92]
>
> *2. To enact detailed rules in each statute conferring a power*
>
> *While this option had the advantage of certainty, this option was not seen as practical as it "would occupy the time of the Legislature with a minutiae of detail that could better be worked out in consultation with those administering the statute. In addition, detailed procedural rules enacted in a statute are inflexible."*[93]
>
> *3. To enact general legislation establishing uniform detailed rules applying to all powers*
>
> *The report also rejected this approach: "Experience in all jurisdictions shows that the diversity in the character, nature and purpose of statutory powers is such that a uniform statute cannot be drawn so as to cover in detail the procedure to be followed in the exercise of all powers which would be consistent with effective governmental action."*[94]
>
> *4. To give in each statute conferring a power authority to make procedural rules for the exercise of the power*
>
> *The committee approved of this option, stating that "Regulations … conferring specific powers for which fair procedure is required, would remove much uncertainty and tend to reconcile justice with governmental efficiency. Both of*

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90 *Ibid*, pp. 206-07.

91 *Ibid*, p. 207.

92 *Ibid*, p. 209.

93 *Ibid*, pp. 209-210.

94 *Ibid*, p. 210.

> *these factors could be weighed specifically in the preparation of the rules applicable to each power. In addition, reasonable flexibility would be maintained. This is the course that has been adopted, in part, in the United Kingdom."*[95]
>
> *5. To enact general legislation establishing uniform minimum rules of procedure for the exercise of powers*
>
> *The committee also approved of this notion, stating that "Minimum rules would establish generally recognized fundamental procedural requirements applying to the exercise of any statutory power where a fair procedure is required. The minimum standards would be supplemented for each tribunal or class of tribunals by detailed rules made by regulation. Adoption of this course would eliminate many uncertainties as to the application and content of minimum requirements in a just procedure. This is the course that has been followed in the United States."*[96]

In the end, McRuer selected a combination of options 4 and 5, which he regarded as being "an adaptation of the best of the systems of the United States and the United Kingdom":

> *Minimum and basic procedural safeguards enacted by legislation have distinct value. They are in the nature of a procedural Bill of Rights, controlling draftsmen and guiding administrators and the courts. The time has come when the Legislature should declare in clear terms those minimum safeguards to which every citizen is entitled in the administrative processes of government. We therefore recommend the enactment of a Statutory Powers Procedure Act with provision for a Statutory Powers Rules Committee…."*[97]
>
> *The Statutory Powers Procedure Act which we recommend should establish:*
>
> > *(a) Minimum rules of procedure applicable to all tribunals, whether judicial or administrative, with certain defined exceptions;*
> >
> > *(b) A Statutory Powers Rules Committee composed as hereinafter indicated with power to make appropriate detailed rules for each tribunal, having regard to the nature and purpose of the powers exercised by it.*
>
> *The provisions of the Act should apply to all tribunals, bodies or persons exercising judicial or administrative powers where fair procedure is required, unless excluded by express language or necessary implication….*
>
> *Much advantage is to be gained from setting out specific rules for the guidance of those exercising statutory powers, even though many of them are a mere codification of the common law. Not only will they know the procedure they must follow, but those who have matters before tribunals will know the controlling procedure.*[98]

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95 *Ibid.*

96 *Ibid*, pp. 210-11.

97 Royal Commission Inquiry on Civil Rights (1968), p. 211.

98 *Ibid*, pp. 212-13.

Because the Rules Committee would address the specifics, the proposed Act would address only the "minimum" procedural requirements, such as notice of hearing, notice of the case to be met, right to counsel subject to exceptions[99], right to lead evidence and cross-examine, and reasons. Unlike the Alberta statute, it would also address key "powers" issues, such as subpoenas, adjournments, oaths, admissibility of evidence, and official notice.[100]

Professor Willis' "irritated dissent"

In 1968, law professor John Willis published an article entitled "The McRuer Report: Lawyers' Values and Civil Servants' Values".[101] Professor Willis began with the caveat that he was undertaking his review in a "mood of irritated dissent", which irritation flowed from the "slant" he perceived both in the Terms of Reference and in the report itself:

> *We are told a great deal about the dreadful things that, as the law now stands, civil servants might do to the citizen but are given no actual instances of them having actually done so. We can see why the citizen, and still more his lawyer looking for loopholes, will like the recommendations, but the civil service point of view is never adequately stated. Second, I dislike its direction – which is: you backsliders must do your level best to cram your awkward selves into the eighteenth-century constitution you have inherited from your forefathers….*[102]

Interestingly, Professor Willis did not comment on statutory powers reform. However, with respect to statutory procedures, he wrote:

> *I agree with the Commission when it says that 'the basic problem is the reconciliation of procedural justice with effective government.' I disagree with it when it goes on to say that 'the conflict between these two demands is often less real than is made to appear'….Under the present common law rules of 'natural justice', uncertain as they are in their application and in their content, we have inherited from a series of English cases an approach to administrative procedure so relaxed that all a deciding authority really has to do is give the citizen 'a fair shake'. If you set up mandatory statutory codes of minimum procedure, however devised, you will inevitably reintroduce into 'non-court' deciding authorities the*

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99 On the issue of right to counsel, the Commission's approach is very different from that of the Franks Committee: "We do not accept the argument that the presence of counsel at a hearing necessarily creates additional expense and undue formality. In fact, in many cases it may be quite otherwise. To deny a right to counsel is to discriminate against the illiterate or inarticulate person. Every person is entitled to expert assistance in the presentation of his case before a tribunal which is empowered to make a decision affecting his rights. Unless the tribunal is in the nature of a court, we see no reason why the expression "counsel" should be confined to members of the legal profession" (p. 215).

100 Ibid, pp. 213-19.

101 Willis, "The McRuer Report: Lawyers' Values and Civil Service Values" (1968), 18 U.T.L.J. 351.

102 *Ibid*, pp. 351, 352.

> *'court' atmosphere that they were created to avoid…. Nor does the Commission produce any evidence to show that anyone has, in the world of 'what actually happens', suffered injustice by reason of their absence….*
>
> *[This said], if we are going to get … mandatory statutory codes, this method of devising them is a good one. Each deciding authority … should therefore concentrate on finding out in what respects its present procedure does not square with the McRuer minima and to what extent it must, in order to do its job effectively, refuse to change it.*[103]

Ontario *Statutory Powers Procedure Act*[104]

Ontario's *Statutory Powers Procedure Act* (*SPPA*) took effect in 1973. Unlike its Alberta counterpart, the *SPPA* addresses tribunal powers as well as procedures. Also in contrast to the Alberta statute, the *SPPA* applies generally to any person exercising powers delegated by statute and required by law to hold a hearing[105], rather than applying to particular tribunals scheduled to the *Act*. In Ontario, the *SPPA* is the general rule; the exceptions must be set out in the enabling statutes of particular tribunals.

The original Ontario *SPPA* followed the McRuer Report's recommendations. It outlined the minimum *procedural* obligations of agencies – what it referred to as the "Minimum Rules for Proceedings of Certain Tribunals" (rights of parties to notice, to counsel, to call witnesses, to cross-examine) – as well as key powers tribunals needed to function, such as rights to issue summonses, close hearings, admit evidence and control its proceedings.[106] The *SPPA* contained a "supremacy" clause making its provisions applicable unless the enabling statute provided to the contrary.[107] And it created a "Statutory Powers Procedure Rules Committee", whose function was to "maintain under continuous review the practice and procedure in proceedings to which Part I applies". Importantly, no tribunal rules could be approved "except after consultation with the Committee".

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103 Ibid, p. 358.

104 R.S.O. 1990, c. S22, as amended by S.O. 1994, c. 27 and S.O. 1997, c. 23.

105 For historical reasons resulting from the state of the law at the time the *SPPA* was passed, the Act's application to bodies required by law to hold a "hearing" is limited to those where a hearing is required by statute, or where the common law would otherwise identify the proceeding as "quasi-judicial": Mullan, *Administrative Law* (2001), c. 11B.

106 The original Act's key provisions are outlined in Evans, Janisch, Mullan and Risk, *Administrative Law* (1st ed., 1984) at pp. 119-122.

107 In this regard, the other key component of the *SPPA* reform was the passage of the *Civil Rights Statute Law Amendment Act, 1971*, S.O. 1971, c. 50, which amended numerous other statutes in order to "custom fit" the *SPPA* to a whole host of decision-makers: see generally Mullan, Administrative Law (2001), ch 11B, p. 2.

Another major contrast with Alberta is that, unlike the Alberta statute, the Ontario *SPPA* has undergone major reform. The first reform exercise took place in 1995, in the wake of calls for change from Robert Macaulay[108], the Attorney General for Ontario and the Society of Ontario Adjudicators and Regulators.[109] The reforms were based on the belief that the original *SPPA* tended to "over-judicialize" agency processes, and that the previous focus on "procedures" needed to be balanced with additional "powers" to enable agencies to operate more effectively. A good example of this concern was David Mullan's comment about the Ontario *SPPA* in 1992:

> *What it fails to do, however, is to make any provision for pre-hearing procedures of any kind – discovery, pre-hearing conferences, agreed statements of fact – all of those devices that have come to play such a significant role in the regular trial process and which are of such potential value as well in the administrative process.*[110]

Consistent with these concerns, the 1995 amendments addressed the following:

- flexibility of tribunal chair to establish panel size;
- authorization for a panel member to continue and complete hearing despite expiry of term;
- power to issue interim orders;
- power to hold written and electronic hearings;
- power to require pre-hearing conferences;
- power to order parties to disclose documents;
- power to combine hearings, use previously admitted evidence, hear evidence from panels of witnesses.

The 1995 amendments made one other very important change. They abolished the Rules Committee which, as Mullan pointed out, "was for many years virtually a dead letter"[111]. Under

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108 Macaulay, *Review of Ontario's Regulatory Agencies* (1989), Government of Ontario, see esp. ch. 9.

109 Porter, Posluns & Harris, *Grey Areas*, "Proposed Amendments to SPPA" (April, 1994). QL, p. 1.

110 Mullan, "Common and Divergent Elements of Practices of the Various Tribunals: An Overview of Present and Possible Future Developments" (1992), Law Society of Upper Canada Special Lectures 461 at pp. 463-64.

111 *Ibid*, p. 464.

the 1995 amendments, administrative tribunals would create their own rules of practice and procedure:

> 25.1(1) A tribunal may make rules governing the practice and procedure before it.
>
> (2) The rules may be of general or particular application.
>
> (3) The rules shall be consistent with this Act and with the other Acts to which they relate.

As an incentive to tribunals to create rules under s. 25.1, many of the most significant 1995 "powers" were drafted in such fashion that they would not apply unless the tribunal developed rules under s. 25.1.[112] For its part, the Society of Ontario Adjudicators and Regulators responded by creating a draft template to assist tribunals seeking to develop their own rules.[113]

A third set of amendments, passed in 1999 and proclaimed in 2000, arose in the wake of the Ontario Government's 1998 report on Regulatory and Adjudicative Agencies (the Guzzo Report).[114] Consistent with the reform process undertaken in 1995, the Guzzo Report focused less on traditional process values than on providing tribunals with tools to balance fairness and efficiency for themselves: "Some changes are also needed to the *SPPA* to give all agencies the full range of powers needed to resolve problems as quickly as possible".[115] Like the later Leggatt Report, Guzzo emphasized independence, as well as the daily trench work of administrative tribunals: matters such as case management and the use of information technology.

Consistent with Guzzo's advice, the most recent amendments[116] were enacted with a view to providing tribunals with even greater flexibility. The highlights included:

- a direction to the courts to "liberally construe" the Act and any rule made by a tribunal;
- provisions allowing tribunals to dismiss proceedings without a hearing;
- provisions authorizing use of ADR, including mandatory ADR, and authorizing tribunal members to participate in such processes;

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112 See for example, s. 4.5(3), 5.1, 5.2, 5.3.

113 Porter, Posluns & Harris, *Grey Areas*, "SOAR Develops Suggested Rules of Procedure for Tribunals" (July, 1995), QL, p. 1. For a copy of the most recent version of SOAR's Sample Rules, see its Website at www.soar.on.ca/soar-rules_prac.htm.

114 "Everyday Justice", Report of the Agency Reform Commission on Ontario's Regulatory and Adjudicative Agencies (April, 1998).

115 *Ibid*, p. 11.

116 S.O., 1999, c. 12.

- a provision stating that "A tribunal shall establish guidelines for setting out the usual time frame for completing proceedings that come before the tribunal and for completing the procedural steps within those proceedings."

David Mullan has expressed regret at the abolition of the original Rules Committee, believing that an external review body would act as a useful check "in ensuring that tribunal or agency self-interest does not impede the development of procedures that are responsive to constituency needs and the even-handed dispensing of administrative justice." Mullan has also suggested that the rule making power has not resulted in a diverse set of rules – rather, "most are adopting the standard set of rules that is doing the rounds".[117]

British Columbia Law Reform Commission Report (1974)

In November, 1974, the Law Reform Commission of British Columbia produced a report entitled *Civil Rights – Procedure Before Administrative Agencies.* This report appears to be the only official and public study of the subject of statutory procedures in the history of this province.[118]

By the time the BC Law Reform Commission embarked upon its review, the subject of statutory procedures had of course recently been addressed both in Alberta and Ontario by way of commission reports and law reform.[119]

Like the other study groups, the BC Law Reform Commission examined the common law, as well as reform exercises that had taken place elsewhere. It reviewed existing statutory procedural requirements in British Columbia. The Commission's conclusion about the state of the statute books, and the situation of the public seeking to appear before administrative agencies, bore a familiar ring to the conclusions reached, both before and since, by its counterparts elsewhere:

> *The statutory procedural requirements in British Columbia are generally inconsistent and incomplete, and their presence often compounds the difficulties involved in determining whether the common law natural justice principles apply.*

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117 Mullan, *Administrative Law* (2001), c. 11E, p. 2 (Q.L.). Whether this lack of diversity is necessarily a bad thing is of course another question. It may well reflect that, for tribunals exercising similar functions, SOAR's Model Rules are in fact practical and workable.

118 Law Reform Commission of British Columbia, Report on Civil Rights – Part 3 – Procedure Before Statutory Agencies (1974).

119 According to the commission's Report, a similar exercise had been undertaken in New Zealand even more recently (1973) but that commission rejected the idea of a "comprehensive code of procedure for all agencies": p. 9.

> *Agencies are left without guidelines as to what procedures they must use, and affected individuals are uncertain of their procedural rights and duties...*[120]
>
> *[T]he standards imposed by statute vary from agency to agency without justification according to any immediately apparent set of consistent principles.*[121]

For the Commission, however, the solution was more elusive. While its research staff recommended a "minimum procedures" statute, the Commission did not feel able to endorse such a proposal.[122] In the end – in a step quite exceptional for law reform bodies – the Law Reform Commission declined to make a recommendation. Instead, it stated that: "The Commission has in the end been able to recommend only that the matter be placed in the hands of a specially constituted body of inquiry"[123], which the Commission suggested be constituted under the *Inquiry Act*.[124]

The Commission's hesitation flowed primarily from its philosophical position that the rules of "procedural fairness" – which it appeared to define as requiring very formal procedures[125] – should not, absent a case-by-case review, presumptively be entitled to greater consideration than any other government purpose.[126] The Commission felt that it was inappropriate to recommend a code of fairness before undertaking an agency-by-agency review of the effect of any such code. It cited a number of examples – dealing with contagious diseases, the fire marshal, food inspection, welfare, investigation and rulemaking – where it felt the full requirements of procedural fairness would be too onerous.[127] Further, and reflecting the influence of John Willis[128], it felt that it had neither the composition nor the resources to undertake the required work:

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120 *Ibid*, p. 21.

121 *Ibid*, p. 36.

122 *Ibid*, p. 7.

123 *Ibid*, p. 55.

124 *Ibid*, p. 44.

125 *ibid*, pp. 46-54. One hastens to recognize that, at the time the commission wrote its report, procedural fairness was often equated with "natural justice" and the full panoply of process associated therewith. Whether the commission's report would have reflected similar angst after *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, and in view of the more flexible understandings of procedure which followed, is of course an open question.

126 *Ibid*, p. 42.

127 *Ibid*, pp. 39-42. It should be noted that the *McRuer Report*, at p. 207, specifically refers to a number of very similar examples to show why procedural protections cannot be universal, and would on occasion even "frustrate immediate necessary governmental action and destroy the protection given the public by the statute". For McRuer, however, these were much more the exception than the rule.

> *What is required is an ability to weigh legal principle against the broader purposes which agencies serve, and the final and administrative cost which compliance with all or some of the rules of procedural fairness would involve for an agency. It does not seem appropriate to us that a Commission composed exclusively of lawyers should embark upon a task which demands a wider area of competence than lawyers may be thought to have.*[129]

The Commission's recommendation for an inquiry was never acted upon. This was the option suggested by the British Columbia Law Reform Commission in 1974.

The BC Law Reform Commission's unusual step of recommending that the issue be deferred to a separately constituted inquiry was thus based on what it perceived as the flaw in deciding about a "code of fairness" before studying the implications of any such code, and its concern that the body making the recommendation should not be confined to lawyers. The advantages of the Law Reform Commission's approach are of course those the commission itself listed: detailed study of each agency before a final decision is made, and input from a wider constituency.

Reflecting on the Law Reform Commission's study 27 years later, a number of additional points may perhaps be in order.

First, as its title makes clear, the BC Law Reform Commission's report was focused on the question of "Procedure Before Statutory Agencies". Its report does not address reform of statutory powers. There is no indication in the commission's report that it would, for example, oppose statutory powers reform of the sort undertaken in Ontario in 1995 and 2000, and recommended in other recent law reform reports.

Second, it may be fair to observe that whatever difficulties may attend the study and debate of statutory procedures, its resolution probably does not demand an *Inquiry Act* process. Given the numerous reports produced on this subject since 1974 in different jurisdictions, public inquiries have not been needed to review the circumstances of individual administrative tribunals and reach the informed public policy conclusions about whether legislative reform is needed.

Third, it is important to note that the Commission's report was predicated on the belief that procedures legislation necessarily implies that "court-like" procedures will be imposed on tribunals, for which such procedures are ill-fitted. While this point reflects the Commission's concerns about "uniform minimum procedures" legislation, it is not an argument against

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128 The commission was clearly well aware of Willis' criticisms of McRuer: see BCLRC Report, p. 36, footnote 1.

129 *Ibid*, p. 43.

legislative reform itself. The Franks Report did not, for example, adopt a minimum code, but still provided a legislative solution intended to achieve principled diversity among tribunals. The Alberta Law Reform Institute's proposal would enact general legislation, but tribunals would "opt in" to the provisions required for their particular needs. And while the Ontario and Quebec statutes do outline the basics of fair procedure, they are sufficiently general that, while providing visibility to a clear set of principles, they are, for most affected tribunals, consistent with the developed common law.

A point may also be made respecting the BC Law Reform Commission's concern about "lawyers' values" and the inspiration it undoubtedly drew from Professor Willis in that regard. Arguments based on "lawyers' values" undoubtedly hold a certain rhetorical appeal. The reality, however, is that lawyers are people, they hold very diverse views and they do not usually support "formalism" as that term was used in the 1960s and 1970s. Lawyers play an important role both as participants and decision-makers in the administrative law system. The English experience has shown that, in practice, the lay members of the Council on Tribunals have "leaned heavily" on their lawyer members.[130] None of this is to downplay the importance of ensuring input and participation from all persons interested in rules, as is often recommended for rule-making exercises.[131] It does suggest, however, that there are means other than a public inquiry by which to achieve broader input by persons interested in and affected by a law reform discussion.

Canada: Federal Jurisdiction

There is no federal legislation regarding statutory powers and procedures. As is the case in seven provinces, the powers and procedures of federal administrative agencies are defined by their enabling legislation, regulations, any procedural guidelines and the common law. This is not to say, however, that statutory reform has not been proposed.

Law Reform Commission of Canada (1980)

In its 1980 working paper, *Independent Administrative Agencies*, the Law Reform Commission of Canada commented that "[t]he wide and inexplicable variation in statutory provisions concerning the powers and procedures of agencies carrying out similar functions ... support[s] the contention that more systematic planning is needed at the earliest stages of the legislative process".[132] The

130 de Smith, Judicial Review of Administrative Action (5th ed, 1995), p. 59.

131 See Janisch, The Choice of Decisionmaking Method: Adjudication, Policies and Rulemaking" (1992), LSUC Special Lectures, p. 259.

132 Law Reform Commission of Canada (1980), Working Paper 25, *Independent Administrative Agencies*, p. 120.

Law Reform Commission's other concern was that, even where the agency has an established practice, that practice exists as "secret law" which is contrary to the public interest.[133] All this led the commission to conclude as follows:

> *Our research on the Canadian federal administrative process leads to the conclusion that there are a sufficient number of problems relating to administrative procedure – in terms of inadequacies and anomalies – to justify that we recommend:*
>
> > *General legislation should be enacted incorporating minimum administrative procedure safeguards or providing means for the development of common procedural guidelines.*[134]

The Law Reform Commission of Canada's 1980 Working Paper led to similar recommendations contained in its 1985 Report entitled *Independent Administrative Agencies*. No action was taken based on the Law Reform Commission's recommendation.

Federal Department of Justice (1995)

In 1995, the Department of Justice issued a discussion paper proposing a federal *Administrative Hearings Powers and Procedures Act*. It was proposed that accompanying such an enactment would be a detailed *Hearing Guide* that would act as a non-binding manual providing practical advice for hearings. Following its initial release in April, 1995, the federal discussion paper underwent two revisions, the most recent of which was published in September 1996.[135] The discussion paper's Introduction poses the question "What Prompted this Proposal?" The answer is stated as follows:

> *There is currently no common procedural structure for federal administrative decision making. Procedural directions in statute, where they are found at all, are vague. Agencies are required to develop procedures in an ad hoc manner. The consequences of this approach are:*
>
> > *i) uncertainty, both within agencies and outside, as to the extent of procedural rights;*
> >
> > *ii) increased difficulty in accessing administrative justice;*

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133 *Ibid*, p. 121.

134 *Ibid*, p. 141.

135 See www.canada.justice.gc.ca/Consultations/Proposal. See also Macaulay, *Practice and Procedure Before Administrative Tribunals*, ch. 38. Macaulay notes that "I understand that while the Department has not formally decided to abandon the project, the proposal has been suspended owing to a lack of resources (which, of course, may come to the same thing)."

> *iii) duplication of effort in the drafting, development and amendment of procedure;*
>
> *iv) delay in the implementation of new programs;*
>
> *v) direct and indirect costs resulting from that duplication, as well as from training costs;*
>
> *vi) judicial challenges; and*
>
> *vii) a failure to utilize the abilities of individuals who are not formally trained in procedures.*

While the Department of Justice proposal would extend both to oral and written hearings, its principal focus is on oral hearings (the decision-makers to whom it would apply are identified in a draft schedule). In substance, this proposal covers many of the same matters canvassed in other modern law reform reports. Its main headings are as follows:

- access to proceedings by parties, and the public
- notice of information
- alternative procedures
- assignments of Hearings, pre-hearing matters
- the hearing; evidence
- power to issue guidelines
- decisions and reasons
- powers: early dismissals, extensions of time, ex parte proceedings, maintaining order, subpoenas, compelling evidence, views, enforcement, member liability

At the time of its original release, the discussion paper garnered significant attention. Writing in 1996, Robert Reid strongly supported the idea:

> *If the [federal] proposal is rejected, it will not be because it is not courageous, innovative or imaginative.*
>
> *The authors confront the fundamental fallacies of Administrative Law: the assumption that anyone can perform the task of hearing and deciding properly without training; that exact procedures, like those of courts, stand in the way of decision-making; and that administrative hearings are somehow simpler than trials. Apologists for Administrative Law dwell on the protraction and expense of court procedures… The cure is to dump the procedure-obsessed courts with their tedious rule books, and the lawyer's mind-set which produced them, and hand over the decision-making process to sensible folk who know the area they*

> *are asked to regulate and will go direct to the heart of the matter without getting tangled in procedure.*
>
> *This is, and was, a vain dream. Yes, the courts had severe shortcomings…. But in their zeal to turn their backs on the courts the reformers went too far… Unfortunately for the dream, the good men they appointed revealed a distinct preference for the arbitrary.*[136]

Robert Macaulay also provided extensive comment on the paper. His primary concerns were as follows: (i) failure to clearly define the role of tribunal chair; (ii) the proposal's failure to recognize the federal government's duty to train tribunal appointments; (iii) excessive focus on oral hearings; and (iv) failure to require agencies to promulgate procedural rules.[137]

To date, the federal government has not acted upon this proposal. Macaulay's text states "I understand that while the Department has not formally decided to abandon the project, the proposal has been suspended owing to a lack of resources (which, of course, may come to the same thing)."[138]

Quebec

In 1988, the Working Group on Administrative Tribunals submitted its report on Administrative Justice. The report, which recommended sweeping reform of Quebec's administrative law system, is more commonly referred to as the "Ouellette Report".[139]

After what one writer referred to as a "long gestation period"[140], the Quebec National Assembly acted upon the Ouellette Report in 1998 by enacting the *Administrative Justice Act*.[141] The Act's

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136 *Reid's Administrative Law Letter*, Vol. 5, No. 3 (Feb. 1996), pp. 49-50.

137 Macaulay, Practice and Procedure Before Administrative Tribunals, p. 38-148.1 – 38-161.

138 Ibid, ch. 38-2.

139 The author was unable to obtain a copy in English of the *Ouellette Report* (*Rapport du Group de travail sure les tribunaux administratifs* (Quebec, Ministry of Justice, 1987). However, that Report is summarized and discussed in Macdonald, "Reflections on the Report of the Quebec Working Group on Administrative Tribunals" (1988), C.J.A.L.P. 337. The discussion started in the *Ouellette Report* continued in the *Garant Report (Rapport du Groupe de travail sur certain questions relatives a la reforme de la justice administrative* (Quebec, Ministry of Justice, 1994).

140 Mullan, Administrative Law (2001), ch. 11D, p. 1.

141 R.S.Q., c. J-3.

major reform - the creation, mandate and management of a new and general "appeal tribunal" consisting of 4 divisions - is beyond the scope of this discussion.[142]

However, the *Administrative Justice Act* also speaks to statutory powers and procedures. Consistent with Ouellette's recommendation, the Act eschews codification in favour of a generic statute setting out basic principles of procedure. These principles, set out in Title I of the Act, are designed to be complemented by detailed rules promulgated by each individual tribunal and tailored to the tribunal's specific needs.[143]

While it addresses most of the same "powers" as the Ontario *SPPA*, the Quebec Act's "procedural" emphasis is unique for decision-makers other than the super-tribunal. The procedural emphasis is on giving parties clear information on relevant issues, access to documentation, opportunity for parties to add to the record before the decision-maker and reasons. Beyond this, the Quebec statute's focus is on the principles that should govern tribunals dispensing administrative justice. These principles refer to adherence to legal norms, the use of simple, flexible and informal rules, respect for affected constituencies including ethnic groups, and good faith in the exercise of power. The Act even outlines standards of conduct for tribunal members.

Finally, the Act creates the Quebec Administrative Review Council, whose functions appear to blend those of the English Council on Tribunals and the Canadian Judicial Council.[144] The rationale for the Council was stated as follows:

> *A body is needed which can deal with complaints as they are, instead of leaving them to build up into a volume of discontent which, every twenty-five years or so, discharges itself in a special but temporary inquest by a committee which merely reports once and then dissolves.*[145]

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142 A more detailed discussion of the Administrative Tribunal of Quebec may be found in Bryden and Gunn, *supra* note 8, at pp. 16-23.

143 *Ibid*, p. 345. The Quebec *Administrative Justice Act* is somewhat more prescriptive in the case of "decisions made in the exercise of an adjudicative function". Even here, however, the Act is concerned primarily with ensuring a full set of powers at the tribunal's disposal, rather than with micro-managing procedure: see ch. VI, ss. 99-158.

144 The Quebec Council may give advice to tribunals regarding procedural rules, but it may also establish a code of ethics, inquire into whether a tribunal member should be removed and receive and examine complaints against members: see ss. 165-198.

145 Quoted in Macdonald, *supra*, note 137, at p. 346.

New Brunswick (1991)

In December 1991, the Law Reform Branch of the New Brunswick Department of Justice issued a discussion paper proposing an "Administrative Procedures Act" for New Brunswick.[146] The paper emphasizes New Brunswick's "vague" and "deficient" legislation on the subject of tribunal powers and procedures, and concludes:

> *In our view, clearly defined procedural safeguards and powers need to be provided. There is no obvious reason for the statutory differences that currently exist, and we suspect that these differences result in reduced efficiency, fairness and comprehensibility in the decision-making process. We suggest that the enactment of an Administrative Procedures Act would provide the necessary means for remedying this situation.*

The New Brunswick proposal is very much a mirror of the McRuer approach: (a) to pass a statute to enact minimum powers and procedures, and (b) to ensure that tribunals themselves have more detailed rules that govern their particular practice, with a "coordinating body" responsible to ensure the promulgation of individual rules. The report suggests that, whether the body is a Council on Tribunals, an informal body established by tribunals, or the Ombudsman, that outside body (rather than the tribunal or government) should have final decision-making responsibility for tribunal rules.

The author is not aware of any legislative action to date in New Brunswick as a result of the Department of Justice proposal.

Nova Scotia (1997)

In January, 1997, the Nova Scotia Law Reform Commission added its voice to the call for standard powers and procedures legislation.[147] A key recommendation of the commission's comprehensive report is that government enact an *Administrative Justice Act* which would (a) set a floor of minimum procedural requirements and powers for administrative agencies but allow adjustments by the agency or the legislature; and (b) require tribunals to develop procedures and rules consistent with the minimum procedures in the Act.[148]

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146 "Proposals for an Administrative Procedures Act: A Discussion Paper", Law Reform Branch, Office of the Attorney General, December, 1991.

147 Nova Scotia Law Reform Commission, Agencies, Boards and Commissions: The Administrative Justice System in Nova Scotia (January, 1997).

148 *Ibid*, Introduction, p. 2.

Consistent with the views expressed in other studies of the matter, the commission emphasized that such a statute should not require decision-makers to follow court-like procedures. It further recognized that even with such an enactment, there "will always be a level of unpredictability". However, after reviewing various approaches, the commission opted for a model based very much on the present Ontario model:

> *After reviewing all of these approaches, the Commission has developed a draft* Administrative Justice Act *.... The Act requires that administrative tribunals develop procedures and rules consistent with the minimum procedures in the Act which must be communicated to the people involved in the hearing. This will ensure that administrative tribunals develop rules that address these issues and it will also help ensure that people are informed about the process which they will encounter. It will still allow each agency the flexibility to make the process as formal or informal as deemed appropriate, subject to natural justice requirements.*[149]

To date, no legislative action has been taken in Nova Scotia based on its Law Reform Commission's report.

4 SUMMARY OF KEY POINTS

Before turning to a discussion of the options for British Columbia, it will be useful to summarize a number of key points arising from the preceding examination of legislation and law reform proposals in Canada and England.

Lack of consistent strategic planning

- Each law reform group that has studied this subject has concluded that the relevant policy-makers of its jurisdiction did not engage in consistent strategic planning regarding tribunal powers and procedures to ensure that the tribunals they created could carry out their mandates effectively and fairly.
- The wide variation in tribunal powers and procedures has not been regarded as evidence of the sort of principled diversity that is often spoken about and encouraged among administrative tribunals. It has instead been regarded as diversity of a more inexplicable variety. This "inexplicable" diversity has been seen as giving rise to these undesirable consequences:
  - Members of the public who are required to interact with tribunals, often do not know what procedure will be followed by the tribunal or by a particular tribunal panel: The

[149] *Ibid*, Recommendations for Reform, p. 8 of 25.

citizen's uncertainty about tribunal procedure can be the product of two factors. First, the tribunal itself may not have given appropriate strategic thought to the question of process. This can result in *ad hoc* procedure, which in turn increases risks of excessive formalism on one hand, and the denial of the basic procedural rights on the other. Alternatively, tribunal procedure may indeed be well established, but may exist as "secret law" that is not communicated to users. In either case, the lack of certainty can create, for the user, undue complication, expense, disadvantage and even an appearance of arbitrariness.

- Tribunals are often not given the powers they need to function effectively and creatively: Where those involved in legislative design do not turn their minds to all alternatives for tribunal design, or rely on inappropriate precedents, there is a serious risk that important tribunal powers designed to enhance efficiency and effectiveness will be omitted, or poorly drafted, and that the tribunal's functioning will be impaired.
- Uncertainty can lead to litigation: Ambiguity about powers and procedures tends to encourage litigation about "jurisdiction" and "rights". This gives rise to expense, distracts the tribunal from its immediate purpose, and results in judicial definitions of the proper balance between rights and effective administration that may or may not reflect the legislative will.

Statutory procedures

- The law reform exercises of the 1950s and 1960s tended to emphasize the need for statutory *procedural* rights designed to protect the citizen from the potential abuse of administrative power. Legislation was regarded as providing protection not provided by the common law of the day, as well as a strong measure of visibility and certainty for the public and tribunals alike.
- Some critics have objected to legislating procedural rights – particularly in the form of "codes of procedure" – on the basis that legislating procedure tends to produce excessive formality and a court-like atmosphere. Proponents of such legislation argue just the opposite: that legislation can be drafted in a fashion that avoids excessive formality while ensuring the necessary structure which accords with basic principles of justice and fairness. This debate has, from time to time, given rise to what the BC Law Reform

Commission described as "an almost ideological conflict involving the relative merits of procedural justice and effective government...."[150]

- From a practical perspective, none of the early reform efforts – and none since – has favoured a single, uniform and comprehensive code of procedures applicable to all tribunals. The real debate has been about whether, as has been accepted in Alberta, Ontario and Quebec, enough tribunals have enough in common to justify legislating certain minimum principles, or whether, as in England, legislative reform should take place solely on a tribunal by tribunal basis.

- A number of methods have been proposed for achieving procedural rules that are properly tailored to the individual needs of tribunals. Some recommend that the rules be made by the tribunals themselves. Others add the gloss of requiring ministerial approval for tribunal rules. Yet others strongly endorse the use of a body that is neither government nor tribunal, to make (or at least to approve) the rules.[151]

Statutory powers

- While earlier law reform exercises tended to focus on "procedures" and "rights", law reform thinking over the past 10 years has devoted much more attention to the need for flexibility and effectiveness in the exercise of statutory powers.

- Over the past decade, an enormous amount of innovative writing and thinking has been done to help identify and articulate statutory powers in a fashion designed to assist tribunals in carrying out their mandates more effectively, efficiently, creatively and with greater jurisdictional clarity. The majority of this work is directed to the "trenches" of daily tribunal operations.

- The extensive work done elsewhere makes it unnecessary to engage in a detailed discussion in this paper of every possible statutory power that might apply to the administrative tribunals that are part of the Administrative Justice Project. The Ontario *SPPA* and the English Council on Tribunals' *Illustrative Basic Rules*, both of which can be

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150 Law Reform Commission of British Columbia, *Report on Civil Rights, Procedure Before Statutory Agencies* (1974), p. 36.

151 Mullan, "Common and Divergent Elements of Practices of the Various Tribunals: An Overview of Present and Possible Future Developments" (1992), Law Society of Upper Canada Special Lectures 461 at pp. 479-80.

easily accessed on the World Wide Web[152], provide useful sources of the most current thinking on this subject. To go further in this paper would run contrary to the theme expressed in all thirteen reports discussed in this paper: detailed design work can only be done on a tribunal by tribunal basis.

- Most recent thinking has identified the following content areas as being relevant to both "appellate tribunals" and "party-party" tribunals. The first four bullets address critical case management and tribunal management powers that are often omitted or inadequately addressed in individual statutes:

  - Pre-Hearing Powers and Procedures: acknowledgements and notifications, dismissal without hearing, consent orders, and pre-hearing conferences, including proactive use of staff and members. This includes giving users as much advice and support as possible to help them understand the tribunal and its procedures.

  - Consensual dispute resolution: authority to engage in ADR practices, to issue tribunal orders giving effect to consensual agreements, to engage in ADR at any point in the proceedings, to protect confidentiality of statements and materials in ADR proceedings.

  - Hearing Powers: authority to adopt general rules of procedure, to grant standing, issue notice of hearing, to set hearing panels, to close hearings in exceptional cases, to proceed in writing or in person, to grant adjournments, not to be fettered by rules of evidence except where this would cause significant unfairness, and to compel witness and documents. Panel chair is responsible for the conduct of the hearing, the rules about wider consultation as set out in *Consolidated-Bathurst* are codified and members are authorized to complete ongoing work after expiry of a term.

  - Miscellaneous Powers: subjects include contempt, costs, extending time, stating a case to the court, *ex parte* decisions, tribunal publication of rules of procedure, process for addressing bias allegations, status of the chair as chief executive officer for the tribunal.

  - Decision and Reasons: interim decisions, time limits for decisions, written reasons, publication of reasons, majority decision, reconsideration and correction of errors.

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152 The Council on Tribunal's Model Rules are available at: www.Council-on-tribunals.gov.uk/specialreports/modelrules.htm; the Ontario *SPPA* is available at http://192.75.156.68/DBLaws/Statutes/English/90s22_e.htm.

- Except perhaps on the appointments question[153], there has been very little controversy attending the question whether tribunal design ought to take these considerations into account. The real debate – which is addressed in the "Options" discussion – has centred on *how* this might best be achieved.

5 OPTIONS

The preceding discussion gives rise to a number of options regarding whether or how law reform with respect to statutory powers and procedures would enable administrative tribunals to serve the public more effectively. As will be apparent from the discussion that follows, some options have a number of elements.

Rather than identify every possible combination of elements that might be regarded as an "option", this paper has sought to identify five primary alternatives. Individuals commenting on the paper are of course invited to specify their preferred mix of elements, and provide any other comment that will ensure different perspectives and interests are properly advanced in this discussion.

Consistent with the purpose of this paper, the author has striven to avoid recommending any particular option. This said, it is recognized that – strive as one might to avoid it – the author's own views may, from time to time, creep into the manner in which alternatives are described or discussed. The author can only provide the reader with the assurance that he has done his best to ensure that the discussion is broad, reasonable and helpful.

Option 1: Status quo

The first option is to preserve the status quo, whereby tribunal powers and procedures are defined according to a mix of legislation and common law, with any needed reform being taken up by government and tribunals directly. Five arguments may be made in favour of this approach:

- From a "procedures" standpoint, the status quo prevents the imposition of undue uniformity on administrative tribunals. The modern common law regarding procedural fairness is sufficiently broad and flexible that it is unnecessary to legislate additional procedures – particularly not uniform minimum procedures – for administrative tribunals. If tribunals wish to issue procedural guidelines, the common law already provides them

153 *Ibid*, at p. 465.

with the authority to do so, provided they meet common law "fairness" standards and do not fetter their discretion.[154]

- As argued by Willis, legislating procedures will tend to formalize tribunal proceedings.
- To the extent that there are any deficiencies in a tribunal's enabling legislation regarding powers and procedures, gaps in that legislation can be taken up directly between tribunals and host ministries. With the benefit of the checklists of powers and procedures drawn from the excellent law reform work done elsewhere, tribunals and their host ministries can make a commitment to sit down and identify what legislative changes are needed on a case by case basis.
- The focus on statutory powers and procedures may divert necessary attention away from issues relating to the appointment, remuneration, support, training and independence of tribunal members, all of which are, in the end, much more important to the day-to-day operations of tribunals than "powers" and "procedures".
- A number of jurisdictions have not acted upon recommendations favouring more systemic reform. This may reasonably imply that a number of other governments have concluded either that there is no real problem that warrants legislative attention, or that the problems of tribunals encountering serious difficulties can adequately be addressed on a case by case basis.

The arguments against the above approach may be summarized as follows:

- Legislators should not abdicate to courts the responsibility to address the core aspects of the balance between procedural justice and effective government. Nor should they underestimate the benefits provided to users and tribunals by a visible and consistent statement of legislative principles relevant to procedural justice. While the common law does authorize tribunals to provide procedural guidance, the practical fact is that many do not do so, or do not do so in a fashion that reflects either transparency or an awareness of procedural creativity and efficiency.
- It is not accurate to equate legislation with formalism. Fairness is not formalism. In addition, the very purpose of legislation may be to restrict common law rules of procedural fairness that are considered inappropriately formal. Legislation may be drafted precisely in order to enable flexible procedures that afford a person an

154 Brown and Evans, Judicial Review of Administrative Action in Canada (2001), pp. 9-94 – 9-95.

opportunity to be heard while still encouraging informal and efficient methods of dispute resolution and hearing procedure.

- It may be unrealistic to suggest that host ministries will promptly or adequately respond to tribunal requests for legislative change to their statutory powers. In the absence of larger and ongoing political commitment to address this subject, *ad hoc* calls for reform by individual tribunals are likely to receive low priority on busy legislative agendas. Moreover, requiring tribunals to approach government on bended knee for *ad hoc* changes places tribunals in an awkward position, particularly when the discussion includes issues that will have arises from cases where the host ministry was a party and has taken a position on the question before the tribunal, or in court. Moreover, this option does not address how statutory powers and procedures are developed for proposed new administrative tribunals .
- The importance of appointments is not an argument against reform of statutory powers and procedures. Whatever reforms government ultimately makes regarding appointments, appointees should have the best legislative tools with which to work.
- It is true that, in some jurisdictions, there has been a lack of legislative response to proposals for legislative action. While this may be evidence that there is no real problem in those jurisdictions, it may be more accurate to conclude that there is a problem, but that there has been no political commitment to address it.

Option 2: Reform tribunals on a case-by-case basis but create a specialized advisory body at arm's length from both tribunals and government to assist in the exercise

The Franks Report embraced the notion of legislative reform to tribunal powers and procedures, but rejected the idea of a minimum statutory procedural code, which had been adopted federally in the United States in 1946. The Franks Report stated that "[we] prefer that the detailed procedure for each type of tribunal should be designed to meet its particular circumstances." For Franks – and for the English ever since – the solution was to establish a specialized body at arm's length from both tribunals and government in order to assist in the exercise. Franks described it as a "Council on Tribunals", and Parliament gave it legal life in 1958. Along with its other roles regarding the appointments process and reporting on the functioning of the tribunal system, the Council would play a key role supporting the executive in the drafting of regulations, and supporting tribunals in the creation of individual rules of practice.

In 2001, the Leggatt Report endorsed the Council on Tribunals, but recommended that the Council's role be formally expanded to require formal consultation on draft statutes as well as regulations. Leggatt also recommended that the Council's advice regarding such legislation be publicly disclosed when bills are given first reading in Parliament. Leggatt's recommendations for an increased Council profile undoubtedly stem from the sorts of concerns outlined by the authors of de Smith, *Judicial Review of Administrative Action*:

> *Its effectiveness is impaired by widespread ignorance of its very existence, its absence of legal powers of investigating and execution, its part-time membership, small staff, very limited budget and lack of any political power base…*
>
> *The Council has sought to raise its research profile and publicize research being conducted by academics and others in the area of administrative justice, but it lacks the wide-ranging statutory brief and proactive stance adopted by bodies such as the Administrative Review Council of Australia and of the Administrative Conference of the United States. It also does not have the advantage of knowing that Government is under a duty to take a "hard look" at its proposals.*[155]

A number of points may be made in support of the English model as reformed in accordance with the Leggatt proposal:

- A standing body serves the public much more effectively than any temporary "inquiry" which merely reports once and then dissolves.
- As a standing body, a Council on Tribunals can be assigned other important "systemic" roles, such as those related to appointments, training and the provision of annual reports regarding the quality of public service provided by the administrative tribunal system.
- The English model encourages legislative reform, but takes a more cautious approach minimizing the risks that may attend "uniform" legislation.
- The English model does not remove from government departments the ultimate right to make policy decisions regarding procedural legislation and rules; it is instead intended to act as a helpful, ongoing and arm's length resource to government to help ensure strategic thinking and informed design.
- Importantly, the English Council on Tribunals also acts at arm's length from tribunals, thus ensuring that agency self-interest does not impede the development of even-handed and responsive procedures.

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155 de Smith et al, *Judicial Review of Administrative Action* (5th ed. 1995), p. 60.

- The English Council on Tribunals is credible because its membership is drawn from different constituencies.
- Finally, the strength of the English model is reinforced by the fact that it has lasted for over 30 years and has inspired similar recommendations in other jurisdictions, such as Ontario, Quebec and New Brunswick.

Three different types of arguments may be made against the English model.

- It may be argued that England's rejection of uniform "minimum" powers and procedures legislation is too cautious, often leading to duplication and "reinventing the wheel" in the drafting of tribunal legislation and regulations.
- Government departments or tribunals do not require any "arm's length" body to advise on statutory powers and procedures. If reform is needed, it should either be a matter between government and tribunals, or it should be addressed as in the Ontario *SPPA*, which confers rule-making authority upon tribunals themselves.
- Others may oppose the English model from the other direction – that a Council is necessary, but that the English Council, even with the Leggatt recommendations, would have no "teeth": it contains no means to ensure either that reform will be initiated, or that when it is, government will listen to its advice. While the English Council has had meaningful influence within the political and civil service culture in England, there is no guarantee that a similar body would have the same success in British Columbia.

Option 3: Develop a *Statutory Powers and Procedures Act*. Make decisions about individual tribunal powers and procedures by (a) a specialized "rules committee", (b) tribunals alone, or (c) tribunals, with final approval by a minister or advice by an external body

The third option is to enact a statutory powers and procedure statute. This option has been the almost universal choice of Canadian law reform bodies, which have differed only on the proposed method of implementation.

Some have referred to such legislation as a "code". This may be something of a misnomer, since a "code" (such as the federal *Criminal Code* or a *Personal Property Security Act*) implies comprehensive, detailed and directive legislation. It may be more accurate to describe statutes such as the modern Ontario *SPPA* and the Quebec *Administrative Justice Act* as "minimum procedures and flexible powers" statutes. Even the Alberta Law Reform Institute's suggestion is something less than a "code", given its "opt-in" implementation approach.

Objections to statutes such as the Ontario *SPPA* and the Quebec *Administrative Justice Act* fall into three general categories:

- The first category of arguments is summarized above under Option 1. These arguments, which draw their inspiration primarily from Willis, oppose systematic legislative reform. They assert that the common law provides appropriate procedural protection for the citizen, that minimum procedures legislation inevitably results in undue formality by administrative tribunals and that deficiencies in tribunal powers can be addressed on an *ad hoc* basis, as the need arises.

- A second set of arguments focuses on the complications inherent in enacting uniform legislation that seeks to be sensitive to the diverse needs of administrative tribunals. The concern here has been summarized by David Mullan as follows:

> *...as exemplified by all three Canadian statutes, one way to respond to these concerns is to realize that it will be impossible to draft a statute that can apply to all forms of statutory decision-making. Choices in the range of the statute's application will have to be made either, in the Alberta way, by leaving its application to executive designation, or in the Ontario and Quebec manner, by use of a formula, which brings within the range of the statute principally individualized decision-making of a final character affecting significant interests of citizens. However, as the sheer quantity of legislative exemptions from the Ontario Act may illustrate, even the most careful honing of the Act's application may amount to insufficient fine-tuning.*[156]

- A third set of arguments objects to noticeable omissions from such legislation. As also noted by Mullan:

> *The notion of commitment to the delivery of administrative justice also raises the controversial issue of one of the most obvious gaps in the three Acts: the absence of any provisions about independence and the appointment and performance of members of tribunals.*[157]

The arguments in favour of statutory powers and procedures legislation may be summarized as follows:

- From a "procedures" standpoint, these statutes seek only to ensure that tribunals accord the citizen minimum procedural safeguards, including adequate notice, the ability to be represented, and the right to call evidence, question other witnesses and receive a decision with reasons. Law reform bodies have been virtually unanimous in concluding that (a) one need not formalize tribunal proceedings in order to ensure that basic

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156 Mullan, *Administrative Law* (2001), ch. 11E, p. 1 (Q.L.).

157 Ibid.

principles of common sense, justice and fairness are protected in tribunal proceedings, (b) these principles apply to enough tribunals to justify a procedures statute, and (c) there is merit in legislating such protections rather than relying on the common law since they are visible and encourage principled rule-making by or for tribunals. As noted by Mullan:

> *[S]tatutes such as the SPPA do have the merit of both providing legislative drafters with a checklist and forcing specific attention to be paid to what items on that list should or should not be applicable to a new or revised "statutory power of decision" with an individual rights or interest focus. The penalty for not addressing that question deliberately is, of course, the overriding effect of the SPPA's entitlements.*

- Even with respect to "minimum" procedures, the Ontario and Quebec statutes recognize the need for flexibility. For example, the Ontario *SPPA* recognizes a party's right to call witnesses, present evidence and cross-examine, but confers discretion on the tribunal to determine the mode of hearing (oral, written, electronic) and provides that cross-examination is limited to that which is "reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding".[158] The Quebec statute goes even further in its effort to encourage flexibility, as reflected in s. 4 of the *Administrative Justice Act* which might easily be adapted to the tribunals included in this review[159]:

> 4. The Administration shall take appropriate measures to ensure:
>
> (1) that procedures are conducted in accordance with legislative and administrative norms or standards and with other applicable rules of law, according to simple and flexible rules devoid of formalism, with respect, prudence and promptness, in accordance with norms and standards of ethics and discipline governing its agents and with the requirements of good faith;
>
> (2) that the citizen is given the opportunity to provide any information useful for the making of the decision and, where necessary, to complete his file;
>
> (3) that decisions are made with diligence, are communicated to the person concerned in clear and concise terms and contain the information required to enable the person to communicate with the Administration;
>
> (4) that the directives governing agents charged with making a decision are in keeping with the principles and obligations under this chapter and are available for consultation by the citizen.

- Mullan has noted that while some may question "the impact or utility of provisions such as the Quebec statute's statement of administrative standards ... such powerful

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158 *SPPA*, s. 10.1(b).

159 The Quebec *Administrative Justice Act*'s definition of "the Administration" would, on its face, appear to capture many tribunals included in Schedule 1 of the AJP Terms of Reference. The *Administrative Justice Act*'s emphasis on procedural flexibility and principle is also reflected in its treatment of "adjudicative" decisions: ss. 9-13.

statements, when backed up by a general political and administrative process commitment to those values, might well be difficult to quantify but overall have an advantageous impact on the functioning of the system of administrative justice."[160]

- The vast majority of law reform thinking over the past 10 years has been dedicated to the question of how to identify and frame statutory powers in a fashion that accords maximum clarity and flexibility to administrative tribunals. Significantly, the literature discloses virtually no objection to the notion of a statute creating a uniform menu of powers from which tribunals or others can select in carrying out their functions. Such powers (a) provide administrative tribunals with opportunities for greater flexibility, active case management and effective dispute resolution; (b) encourage the development of well-considered and transparent tribunal rules and procedures; and (c) limit jurisdictional wrangling both at the tribunal, and in court.

All this raises an interesting point. It is not written in stone that statutory powers and procedures must be legislated together. Since the primary debate regarding "uniform" legislation has revolved around its "procedural rights" component, even a jurisdiction that is cautious about legislating "minimum procedures" may wish to proceed with "statutory powers" legislation. Nor is there anything preventing such a statute from addressing matters such as appointments, independence and training.

For most law reform bodies that have examined this question over the past decade, the question has not been whether such legislation should exist, but rather how it is implemented. Two key implementation questions arise. The first is whether the statute ought to apply on a "tribunal by tribunal" basis, as in Alberta, or whether it ought to apply "definitionally", as is the case in Ontario and Quebec. The result in practice may not be very different, since on either approach, each administrative tribunal will have to be examined to determine the extent to which the model provisions should apply.

The second and more important question is how the fundamental object of the exercise – the establishment of visible and properly tailored *individual* tribunal rules and procedures – will be achieved. None of the law reform reports that have examined this question since the Second

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160 Mullan, *Administrative Law* (2001), ch. 11E, p. 1 (Q.L.).

World War have proposed leaving this to government departments alone. Instead, three approaches have been recommended:

- create a Rules Committee with decision-making power (the McRuer approach, also recommended for New Brunswick);
- confer rule-making authority on the tribunals themselves (the present Ontario and Quebec approaches and the approaches recommended by the Federal Department of Justice and the Nova Scotia Law Reform Commission);
- have tribunals play a primary rule-making role, subject to approval by a minister (Alberta Law Reform Institute approach) or advice by an external body, called an Administrative Justice Council (the Quebec approach).

The policy question inherent in these options is whether tribunals ought to have rule-making autonomy, whether government ought to have the "last word" or whether the rule-making function is better exercised with the involvement of an agency that is independent of both government and tribunals.

David Mullan has, on more than one occasion, promoted the latter model. In 1992 and 2001 respectively, Mullan wrote as follows:

> *The possibilities of the [SPPA] have not been fulfilled largely because of the virtual disappearance of the Statutory Powers Procedure Rules Committee…. [That] Committee should be the cornerstone of any such amendment with the assurance of individualized attention to the particular demands of specific processes that a fully operational body such as that will bring with it…. Properly conceived and implemented, such a process is one in which the nature of the Committee would one of cooperative enterprise with and support of administrative tribunals … not that of unwanted and irritating interloper in matters where the tribunal knows best. Indeed, the very considerable efforts … of tribunal members across the country over the past few years to achieve improved status, continuing education, a sharing of experience, and a high level of professionalism makes it clear that such a body would be welcomed as long overdue.*[161]
>
> *It is, however, unfortunate that, for what were probably budgetary considerations, the 1994 amendments [to the SPPA] finally disbanded the moribund Statutory Powers Procedure Rules Committee. Under the 1971 Act, this Committee ostensibly had responsibility for superintending the procedural rules of all administrative tribunals and agencies across the province, whether subject to the special procedural provisions of the SPPA or not. Such checks are important in ensuring that agency self-interest does not impede the development of procedures that are responsive to constituency needs and the even-handed dispensing of administrative justice…. It is also disappointing that*

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161 Mullan, "Common and Divergent Elements of Practices of the Various Tribunals: An Overview of Present and Possible Future Developments" (1992), Law Society of Upper Canada Special Lectures 461 at pp. 479-80.

> *consideration was not given to mandatory notice and comment rule-making as a possible substitute for the existence of such a superintending role.*[162]

The modern Ontario approach, on the other hand, has been to accept tribunal rule-making autonomy. This model implicitly recognizes that tribunals already enjoy common law autonomy to create procedural guidelines, and that the procedural safeguards both in the *SPPA* and at common law operate as a safeguard to ensure that "agency self-interest" does not dictate outcomes. It recognizes that tribunals are professional organizations that also enjoy the benefits of provincial and national associations. Thus, not only does the Ontario legislation accept agency rule-making autonomy, it encourages such autonomy by providing that certain of the more innovative case-management provisions of the *SPPA* can only be exercised if the tribunal has made individual rules.

The third approach is the one suggested by the Alberta Law Reform Institute. Under the institute's approach, tribunals would be required to make procedural rules, but these rules would have to be approved by a minister such as (in Alberta) the Minister of Justice. For the institute, this approach excludes the need for any external body to be involved, and also balances tribunal input with political responsibility.

The Quebec approach is a hybrid of the latter two approaches: Tribunals have rule-making power, but in exercising those powers they receive "advice" from the Administrative Justice Council.[163]

As reflected in these alternatives, one's preference for a particular implementation strategy depends very much on one's assessment of who would do the best job in establishing truly credible and functional rules for individual tribunals. Some may argue that wherever rule-making is involved, governments should always make the final decisions because rules are "legislative" in nature. Others would argue that governments do not know enough about individual tribunals, and may have a self-interest in establishing rules that suit their ministries (who are often parties) rather than the larger public interest. Some persons objecting to rule-making by government may argue that tribunal members know their boards best and that they should have exclusive rule-making authority. Others argue that agencies are subject to their own types of narrow interests, and that the appropriate safeguard can only come with participation an outside body such as a rules committee.

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162 Mullan, *Administrative Law* (2001), ch. 11E, p. 2 (Q.L.).

163 *Administrative Justice Act*, R.S.Q., c. J-3, s. 177(1).

Option 4: Grant rule-making powers to tribunals with no additional legislative reform

The final option considered in this paper is to enact a simple amendment granting rule-making authority to administrative tribunals, without any additional reforms relating to statutory powers and procedures. Provisions of this sort presently exist in some British Columbia enactments. See for example section 44 of *Medicare Protection Act*[164] which establishes the Medical and Health Care Services Appeal Board:

> 44 (1) The board may make rules governing practice and procedure for all appeals before the board
>
> (2) The rules may be different for appeals by beneficiaries and practitioners and in respect of diagnostic facilities.
>
> (3) A copy of the rules must be made available to any person who appeals.

Simple provisions such as these may be said to have certain benefits. First, they allow tribunals to establish firm rules of practice, which rules might otherwise be seen as a "fettering of discretion" at common law. Second, they shift the responsibility for making such rules away from the Lieutenant Governor in Council (where they usually reside) to the agency that knows most about the tribunal's needs: the tribunal itself. Third, authority to make rules related to "practice and procedure" provides wide scope for flexible and creative rules that tribunals can draft to accommodate their individual needs. Finally, if a rule change is required, tribunal rule-making allows it to take place efficiently, and without the delay that often attends requests to a busy Cabinet.

There are a number of potential disadvantages if reform is confined to a simple rule-making power.

It is not clear at law whether the power to make rules regarding "practice and procedure" encompasses important powers some may seek to characterize as being "substantive" – for example, powers to summarily dismiss appeals, grant interim relief, compel witnesses to give evidence, order costs or reconsider decisions. Such uncertainty tends to invite litigation. Nor does it address important issues such as the role of the chair and the ability of members to complete work after the expiry of their terms.

Moreover, the very point of many of the law reform studies to date has been that the common law ability to establish procedural guidelines has often been exercised incompletely, inappropriately and inconsistently. Part-time boards may not have the same capacity to engage in this exercise

as full-time boards. Furthermore, it is possible that agency self-interest may come into play, particularly with respect to full-time boards. McRuer addressed this latter point by recommending a rules committee. In Quebec, tribunals make the rules, but the rules are monitored by the Administrative Review Council. The present Ontario approach gives tribunals rule-making autonomy, but provides a statutory safeguard which at least requires rules to be made before certain powers are exercised.

6 CONCLUSION

This paper has sought to achieve three main objectives.

The first has been to provide the reader with a meaningful overview of the significant amount of legislative and law reform thinking that has attended the question of statutory powers and procedures. That issue has not been examined in any comprehensive way in this province since the BC Law Reform Commission undertook the challenge 27 years ago.

The second goal has been to reinforce the importance of making decisions about "statutory powers and procedures" as part of any systematic inquiry into the reform of the administrative justice system. In that context, this paper seeks to acquaint the reader with the key issues, tensions and themes that have arisen.

The final and overarching objective has of course been to encourage meaningful discussion about whether, as suggested in the opening quotation to this paper, "a gram of legislative prophylaxis" may be found which not only protects against "a kilogram of prerogative writs", but also allows administrative tribunals to undertake their public service functions in a necessarily diverse but truly principled fashion.

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164 *Medicare Protection Act*, R.S.B.C. 1996, c. 286.